Supreme Court, U.S.
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No. 09-18

In The

# Supreme Court of the United States

GANG B. SONG,

*Petitioner,*

v.

PAMELA TURNER, CHARLOTTE BUSH and CITY OF DETROIT,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. A misstatement contained in Petitioner's claim caused the District Court and the Appeals Court to dismiss Petitioner's entire racial claim. Misunderstanding by the two courts of the key provision of a City's administrative rule contributed greatly to the two courts' dismissal of Petitioner's retaliation claim. That is, the misstatement in the Petitioner's claim and misunderstanding of the key provision by the two courts led the two courts to grant and affirm Respondents' motion for Summary Judgment. Were granting and affirming Respondents' motion for Summary Judgment appropriate?

2. If the District Court had held a hearing or if the Appeals Court had held an oral argument, the misstatement in the claim would have likely been discovered and misunderstanding of the key provision would have definitely been clarified. Were granting and affirming Respondents' motion for Summary Judgment not premature?

3. What both the District Court and the Appeals Court argue against is the same as what was said in the letter Petitioner/Appellant sent to the District Court which he later asked the District Court to discard. That is, the two courts rebuke what Petitioner/Appellant recanted. For some issues the two courts misunderstand but insist that they are right without giving any opportunity for the Petitioner/Appellant to explain. What is the role of the Supreme Court in this situation?

**QUESTIONS PRESENTED** – Continued

4. At every entity related to the present case, some type of error has been made in a small or not small way adverse to Petitioner/Appellant. As a result, the right of the Respondents/Appellees was much more protected than the right of the Petitioner/ Appellant was. Is this not violation of the equal protection under the constitution?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | v |
| PETITION FOR A WRIT OF CERTIORARI | 1 |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| THE MISSTATEMENT IN THE RACE CLAIM | 4 |
| A. The misstatement | 4 |
| B. How the misstatement was entered at the EEOC | 7 |
| C. The misstatement in the claim and Response to Motion submitted by Song's counsel | 8 |
| REASONS FOR GRANTING THE PETITION | 10 |
| THE KEY PROVISION OF THE RULE OF CONDUCTING REDUCTION IN FORCE AND RETALIATION CLAIM | 10 |
| A. Misunderstanding of the key provision by the District Court and the Appeals Court | 10 |
| B. Misunderstanding of the key provision by the hearing officer and his report | 11 |
| C. Misunderstanding of the key provision by Song's counsel and Response to Motion | 13 |

TABLE OF CONTENTS – Continued

Page

D. The courts rebuke what Song recanted ..... 14

E. The issues the courts misunderstand but insist that they are right ..... 15

F. How the City violated the rule of conducting reduction in force ..... 17

G. Obstruction by a Human Resources Department official and by the Civil Service Commission ..... 19

CONCLUSION ..... 20

APPENDIX

U.S. Court of Appeals for the Sixth Circuit, Order (dated Dec. 1, 2008) ..... App. 1

U.S. District Court for the Eastern District of Michigan, Opinion and Order (dated Mar. 31, 2008) ..... App. 9

City of Detroit Civil Service Commission, Hearing Officer's Findings and Recommendations (dated Jan. 15, 2007) ..... App. 32

U.S. Court of Appeals for the Sixth Circuit, Order Denying Rehearing (dated Feb. 24, 2009) ..... App. 44

Detroit Field Office Intake Questionnaire ..... App. 45

Charge of Discrimination Form ..... App. 47

Notice of Reduction in Force Rights ..... App. 49

# TABLE OF AUTHORITIES

Page

RULES

Reduction in Force, Rule 10 ..... *passim*

Fed.R.App.P. 40 ..... 1

CONSTITUTION AND STATUTES

Equal Protection Clause, U.S. Constitution ..... 2

42 U.S.C. §2000e ..... 2

## PETITION FOR A WRIT OF CERTIORARI

Gang B. Song ("Song") respectfully petitions for a Writ of Certiorari to review the Order of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals below is published and is listed as *Gang Song v. Pamela Turner, et al.*, No. 08-1527 (App. at A1-8). The opinion of the district court below is published as *Gang v. Pamela Turner, Charlotte Bush, and City of Detroit*, No. 06-14073 (Id., App. at A9-31).

## JURISDICTION

The Court of Appeals below entered its judgment on December 01, 2008. A timely motion for rehearing pursuant to Fed.R.App.P. 40 was filed on December 15, 2008. The motion was denied by the Court of Appeals below on February 24, 2009. (Id. at A44). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions at issue in this case are the Equal Protection Clause of the U.S. Constitution and 42 U.S.C. §2000e.

Title 42, United States Code, Section 2000e provides:

> 42 U.S.C. §2000e-2. Unlawful employment practices
>
> **(a) Employer practices**
>
> It shall be an unlawful employment practice for an employer –
>
> **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> **(2)** to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

## STATEMENT OF THE CASE

The Petitioner, Gang Song, of this Writ of Certiorari was demoted on April 21, 2006 in the name of reduction in force ("the RIF") in the Water and Sewerage Department ("the Department") of the City of Detroit ("the City").

Song went to U.S. Equal Employment Opportunity Commission ("the EEOC") and filed a charge of discrimination on May 25, 2006. EEOC dismissed Song's charge.

An administrative hearing was held on December 15, 2006 for the grievance Song filed with the City on April 24, 2006. The hearing officer denied Song's grievance. Song appeared in front of the City's Civil service Commission ("the Commission") on February 21, 2007 and the Commission accepted the hearing officer's decision denying the grievance on March 23, 2007.

Song filed a lawsuit with U.S. District Court Eastern District of Michigan Southern Division ("the District Court") on September 15, 2006. The District Court granted Respondent's motion for Summary Judgment on March 31, 2008.

Song appealed to U.S. Court of Appeals for the Sixth Circuit ("the Appeals Court") on April 15, 2008. The Appeals Court affirmed the District Court's order granting summary judgment to the Respondents on December 1, 2008. Song filed petition for rehearing on

December 15, 2008. The Appeals Court denied the petition on February 24, 2009.

## THE MISSTATEMENT IN THE RACE CLAIM

### A. The misstatement

The Petitioner's claim analyzed by the District Court is a combination of claims originated from the EEOC, from Song's Form Complaints submitted to the District Court and from Response to Motion submitted by Song's counsel.

The Petitioner's claim originated from EEOC contained the following statement: "I believe I was demoted because of my race, Asian (Korean)." The EEOC investigator typed the statement on the Charge of Discrimination form even though he and Song did not utter the statement, not even once, during the interview. The statement had never been in Song's mind to say when he went to the EEOC and therefore Song calls it the misstatement.

What Song intended to claim was that racial discrimination had occurred in the past before the RIF was conducted and that his demotion during the RIF was only retaliation against what Song said about the racial preferential treatment the Respondents had received in the past prior to the RIF. Song does not claim that the RIF itself was conducted in a discriminatory manner against him.

Only recently when Song was contemplating to file a petition with the Supreme Court, Song noticed the misstatement again after three years and, having gone through a long court process, Song was finally able to recognize that the misstatement must have caused the District Court and the Appeals Court to look for a similarly-situated employee outside the protected class who was not demoted for the RIF. Since there was no employee who exactly meets this criterion of "a similarly-situated employee outside the protected class who was not demoted" in Song's case, the courts dismissed Song's entire racial claim even though Song had never intended to claim the misstatement.

The following are the reasons why the misstatement has never been in Song's mind to claim. First, Song simply did not have, at the time Song went to the EEOC, the data on the demoted or laid-off employees to enable him to determine whether or not the RIF was discriminatory. Second, Song was aware that it would be very difficult in a Department-wide RIF to discriminate, more so than to retaliate just an employee, an employee of one race to spare an employee of another race without violating the objective criteria specified in the rule of conducting RIF ("Rule 10") and that the discrimination will be easily detected, more easily than the retaliation will be, if the criteria are violated. Only those who do not know how the Department-wide RIF is conducted will automatically assume that RIF itself can be done in a racially discriminatory manner. Finally, Song was

also aware that it would be difficult, in Department-wide layoffs and demotions, to select employees of one race to save employees of another race in the Department where many races of employees are scattered in various offices.

The following proves that the misstatement has never been in Song's mind to claim. Song went to EEOC and wrote down with his hand the following claim on the Intake Questionnaire form given to him (App. 46): "Ms. Pamela Turner used Reduction in Force to demote and transfer me. I believe that this decision was, at least partially, affected by her desire to retaliate me for what I wrote and said about the extraordinary preferential treatment she got some of which at the expense of me."

The EEOC investigator who interviewed Song typed on the Charge of Discrimination form the following as Song's claim (App. 47): "I began employment with . . . I believe I was demoted because of my race, Asian (Korean), and in retaliation . . . as amended."

Comparing the two claims on the two different forms in the above, it is seen that the statement in the claim written by the EEOC investigator, "I believe I was demoted because of my race, Asian (Korean)," is not in the claim written by Song himself. This proves that the misstatement was not in Song's mind to claim when Song went to the EEOC.

Song said in the Form Complaint he submitted to the District Court that his demotion was retaliation

but nowhere in the Form Complaint Song says that he was demoted simply because of his race. This proves again that the misstatement was not what Song intended to claim.

**B. How the misstatement was entered at the EEOC**

The EEOC investigator told Song that he was a veteran of U.S. Marine Corps and that he visited Korean Marine Corps in the past. He had a very good impression on Korean Marine Corps and was very friendly to Song. Song told him he was a veteran of Korean Marine Corps. The investigator and Song were talking and laughing most of the time and Song's claim was not discussed seriously. A while later, the investigator went to another room, typed Song's claim on the Charge of Discrimination form and asked Song to sign at the bottom if Song agreed with his typewritten claim.

When Song found some typos, he retyped and came back. When he retyped, he made new typos. When finally there were no more typos, Song got a glimpse of the misstatement and wondered why he typed the statement. By that time, however, the investigator and Song were in a hurry since they spent a lot of time talking and laughing. Song did not have time to read the misstatement again and think about it carefully and Song could not ask such a nice person to retype the claim again since he already retyped two or three times. So Song got out of the

room without signing after the phrase, "I swear or affirm that . . . and belief" (App. 48). When he was waiting for the elevator, however, the misstatement bothered him. So he went back and waited in the hallway for the right time to see the investigator again. While he was waiting in the hallway, an employee at the EEOC told Song loudly not to be lingering in the hallway. The employee was the same person who was unfriendly when Song asked some questions earlier. Song was intimidated and left the EEOC. Song forgot about the misstatement soon afterwards.

When EEOC dismissed Song's charges saying that Song had no true comparative in his case, he did not know why exactly EEOC was looking for a true comparative. Only recently when he was contemplating to file a petition with the Supreme Court, he happened to read the EEOC documents again. He then was convinced that EEOC was looking for a true comparative because of the misstatement on the Charge of Discrimination form.

### C. The misstatement in the claim and Response to Motion submitted by Song's counsel

When Respondents' counsel filed motion for Summary Judgment, Song's counsel, Mr. Richard Meier, did not tell Song. Only when Song called him to ask about a court date, he told Song that the Respondents filed the motion. After a couple of more

calls in late November 2007, Mr. Meier did not answer Song's phone calls, did not return Song's messages and did not reply Song's emails.

Song's counsel has never discussed with Song about what he is going to write in his Response to Motion. Therefore Song and his counsel did not have any opportunity to examine the claim and the facts. As a result, Song's counsel did not know that the EEOC claim contained the misstatement Song did not intend to claim and that several facts he was going to use in Response to Motion are inconsistent and false. Mr. Meier's argument for the claim containing the misstatement with the inconsistent and false facts may have confused the District Court to discredit Song, which in turn aided the District Court to dismiss Song's entire racial claim. The remark made by Song about unionized engineers was misunderstood by the courts as a racial issue and the courts wrongly linked the remark to the misstatement. This will be explained later.

When Song called Mr. Meier on April 12, 2008 and left a message asking about his help with an appeal to the Appeals Court, he called Song and told Song how much his fee would be.

## REASONS FOR GRANTING THE PETITION

## THE KEY PROVISION OF THE RULE OF CONDUCTING REDUCTION IN FORCE AND RETALIATION CLAIM

### A. Misunderstanding of the key provision by the District Court and the Appeals Court

The District Court cites in its Opinion and Order (App. 11-13) Section 2, Paragraph b of Rule 10 as the key provision of Rule 10. The key provision tells that there are two types of demotions, specifies the criteria to be met when employees are selected for each type of demotion and describes how the employee who was selected for demotion may eventually be laid off.

Subsubparagraph a of Subparagraph 2 of Paragraph b of Section 2 ("Section 2.b.2.a") specifies the criteria of "Demotion in Series" and Subsubparagraph b of Subparagraph 2 of Paragraph b of Section 2 ("Section 2.b.2.b") specifies the criteria of "Demotion or Transfer to a Formerly-Held Class."

As the Notice of Reduction in Force Rights (App. 49, 50) says, the Respondents demoted Song to his formerly-held class and therefore the Respondents should not have violated Section 2.b.2.b. If one understands or does not mistake the simple terminology "(occupational) series" for something else, one can see easily and clearly that the Respondents violated Section 2.b.2.b. The violation is violation of the letter of Section 2.b.2.b, therefore it is

not arguable and there is no need for analysis. This will be further explained later.

What the District Court says (App. 22-25) in its Opinion and Order and what the Appeals Court says (App. 5, 6) in its Order clearly reveal that both courts misunderstood the key provision or are confused about it and consequently that the courts could not see that the Respondents violated the key provision. This failure by the courts to see the Respondents' violation caused the courts to discredit Song and was a major contributing factor for the courts' dismissal of Song's retaliation claim. This in turn led to granting and affirming the Respondents' motion of Summary Judgment.

Report (App. 32-43) written by the hearing officer for the employee grievance Song filed with the City, Response to Motion submitted by Song's counsel to the District Court and Song's own letters sent to the District Court in February and March of 2008 may all have added confusion to the District Court.

## B. Misunderstanding of the key provision by the hearing officer and his report

Hearing officer says Paragraph a of Section 1 ("Section 1.a") and Subsubparagraph a of Sub-paragraph 2 of Paragraph b of Section 2 ("Section 2.b.2 a") are applicable to an analysis of Song's grievance and cites them (App. 38-40) in his report.

As mentioned earlier, the Respondents demoted Song to his formerly-held class in violation of Section 2.b.2.b and therefore Section 2.b.2.b is applicable to Song's grievance, not Section 2.b.2.a. This indicates that the hearing officer could not even know which subsubparagraph of the key provision was applicable to Song's demotion. This ignorance of his is consistent with the fact that he gave no discussion at all as to whether or not the Respondents violated the key provision, which is the most objective and important deciding factor in a grievance hearing. This is not the only serious fault in his report. There are many examples in his report showing that he does not check the truthfulness of the facts he used.

Hearing officer made a wrong conclusion when he denied Song's grievance and this may have added confusion to the District Court and must have aided the District Court and the Appeals Court to dismiss Song's retaliation claim.

Demoting Song from Water & Wastewater Systems Maintenance Engineer to his formerly-held class, Senior Associate Civil Engineer-Design is violation of Section 2.b.2.b because Song's formerly-held class, Senior Associate Civil Engineer-Design belongs to an (occupational) series, Design, as is indicated by the hyphenated word at the end of the class title. Section 2.b.2.b says, "If . . . held . . . class not in series. . . ." At the time of hearing Song misunderstood the key provision, thus did not know that the Respondents violated Section 2.b.2.b. and could not mention Section 2.b.2.b.

If, suppose that, the Respondents had demoted Song in series, then they would have violated Section 2.b.2.a. It is because the class, Water & Wastewater Systems Maintenance Engineer, does not belong to any occupational series. Section 2.b.2.a says, "If . . . is in a class in an occupational series. . . ."

This violation would be a violation of the letter of Section 2.b.2.a. Therefore the violation would be inarguable and would need no analysis. The hearing officer did not know this either.

This means that there is no way the Respondents could have demoted Song without violating Rule 10. Hearing officer submitted his report on January 15, 2007 and this means that he did not understand the key provision even after he spent a month writing his report.

### C. Misunderstanding of the key provision by Song's counsel and Response to Motion

Song's counsel, in his Response to Motion submitted to the District Court on November 21, 2007, argues about the number of levels of demotion in relation to the key provision, EEOC charge, disparate treatment by the main Respondent prior to Song's demotion, race and nationality. He was correct about Song's demotion being two levels but he was wrong about several facts.

His most critical failure, however, was that he did not know that the Respondents violated Section

2.b.2.b and therefore could not tell the District Court the violation. Consequently, Song's counsel confused the District Court or directed the District Court's attention to wrong issues and ended up inviting the District Court and the Appeals Court to discredit Song, which contributed to dismissal of Song's retaliation claim.

**D. The courts rebuke what Song recanted**

When Song sent a letter dated February 28, 2008 to the District Court, he still misunderstood the key provision of Rule 10. Soon afterwards he understood the key provision when he read Reply to Response to Motion submitted by the Respondents' counsel. So he sent another letter dated March 5, 2008 to the District Court in which he asked the District Court to discard the previous letter dated February 28, 2008 and explained how the Respondents violated the key provision when they demoted Song. Song sent two more letters afterwards. The District Court said (App. 31) it declined the letters Song sent.

However, what the District Court (App. 24, 25) and the Appeals Court (App. 5, 6) rebuke in their Opinion and Order is what Song said in the letter dated February 28, 2008 which Song asked the District Court to discard by the letter dated March 5, 2008.

If the District Court had accepted and considered Song's letters, the District Court would have understood the key provision and therefore would

have learned that the Respondents definitely violated Section 2.b.2.b. Since Rule 10 is not a law and is just an administrative rule, someone who is familiar with the City's classification system can understand Rule 10 better than the District Court and the Appeals Court.

As is explained later, the Respondents violated other sections of Rule 10 as well. If the District Court had known violation of these other sections also, it would have been very difficult for the District Court to dismiss Song's retaliation claim.

### E. The issues the courts misunderstand but insist that they are right

When Song was promoted from Senior Associate Civil Engineer-Design to Water & Wastewater Systems Maintenance Engineer, he was promoted two levels, jumping the class between the two, Engineer of Water Systems. Similarly, he was demoted two levels when he was demoted to his formerly-held class. But the District Court does not accept that Song was demoted two levels (App. 25). What Song is emphasizing is the fact that the Respondents violated Rule 10 overwhelmingly and blatantly, not the fact that he was demoted two levels. If Song had been demoted in accordance with Rule 10, the number of levels of demotion becomes a nonissue.

The District Court also mentions (App. 25) the acknowledgement Song made at the grievance hearing before Mr. Obee. Song conceded something at

the grievance hearing (App. 38) but Song conceded it because Song misunderstood the key provision of Rule 10 at the time. The fact that Mr. Obee writes what Song conceded at the hearing in his report reinforces that Mr. Obee, a lawyer, had no understanding of the key provision even a month after the hearing. Mr. Obee was also very negligent in checking the facts.

Both courts also devote a lot of their attention to what Song said about union employees. Song mentioned the union (Association of Detroit Engineers, ADE) as a fairness or common sense issue, not as a racial issue.

But the two courts devote much to rebuke Song as if Song had claimed that he was racially discriminated in favor of the ADE union members. Song knows very well that union members are of many races. Why would he mention the ADE union engineers as a racial issue? As mentioned earlier, Song has never intended to claim that the RIF itself was conducted in a discriminatory manner against him.

Song mentioned ADE because the City rescinded layoffs and demotions of ADE members even though ADE won the arbitration over a very minor union contract item violation compared to the blatant and overwhelming violation of Rule 10 against Song. Song mentioned ADE also because ADE members were demoted or laid off because they were "bumped" by higher-level engineers and therefore the higher-level

engineers should be, in common sense, bumped back to their original positions when ADE were back at their original positions. But the City did not rescind layoffs and demotions of the higher-level engineers.

## F. How the City violated the rule of conducting reduction in force

As the Notice of Reduction in Force Rights (App. 49, 50) says, the Respondents demoted Song from Water & Wastewater Systems Maintenance Engineer to his formerly-held class, Senior Associate Civil Engineer-Design. This violates the letter of Section 2.b.2.b of Rule 10. This is because his formerly-held class, Senior Associate Civil Engineer-Design is in the (occupational) series, Design, and Section 2.b.2.b requires that "If . . . in another class not in series. . . ."

Any class title of unionized engineers shows the discipline such "civil," "electrical," "mechanical," etc. and the (occupational) series such as "design," "operation," "industrial waste control," etc. The series are used to divide the unionized engineers within a given engineering discipline into a few subgroups. The series is always shown as the hyphenated word at the end of the class title.

Senior Associate Civil Engineer-Design is one of the class titles of unionized engineers and it tells that the discipline is civil engineering and the (occupational) series is design. Water & Wastewater Systems Maintenance Engineer is one of the class titles

of non-union engineers and therefore it has neither a discipline nor a series. It is because non-union engineers are on the administrative roster or hold managerial positions, in other words, they supervise unionized engineers of any discipline in any series. Non-union engineers are not divided by series and therefore class titles of non-union engineers do not have any series designations. Class titles of most non-union engineers do not even indicate engineering disciplines.

Section 2.b.2.b was not the only section of Rule 10 the Respondents violated. As the following explains, the Respondents violated other sections of Rule 10 as well.

The Department posted a vacancy announcement for a Water & Wastewater Systems Maintenance Engineer in November 2005 and then cancelled the announcement just before the Respondents demoted Song during the RIF in April 2006. Then the Department re-posted the announcement in August 2006 after Song was demoted.

This posted, cancelled and then re-posted vacancy announcement together with the fact that Song was the only employee in the Water & Wastewater Systems Maintenance Engineer class at the time of reduction in force means that there was no lack of funds and there was no lack of work for one Water & Wastewater Systems Maintenance Engineer in the Department but the Department did not want Song in the class. This is violation of Paragraph a of

Section 1 ("Section 1.a") of Rule 10 which says, "A reduction . . . lack of fund, lack of work, . . ." and also violation of Section 2 which says, "Reduction in force shall be by class. . . ." Section 2 prohibits selecting a particular employee for layoff or demotion. It also violates Section 4.a and the spirit of Section 9.

Not a single non-union engineer except Song was demoted or laid off during the 2006 Reduction in Force.

Since Song was a non-union engineer prior to his demotion, he was not bound by any union contract and therefore, if there had genuinely been lack of work or lack of fund, the Respondents could have legitimately demoted or transferred Song as the City has been doing to non-union engineers. Why the Respondents violated Rule 10 to demote or transfer Song?

**G. Obstruction by a Human Resources Department official and by the Civil Service Commission**

One day in January or February 2007 Song went to the office of Ms. Kimberly Hall, a general manager in the City's Human Resources Department, asked her several times if she could bring a Rule 10 book from her office and answer Song's questions on the key provision. She said she wrote Rule 10 but she never brought a Rule 10 book and never answered Song's question. This is a type of obstruction of justice.

Song was in front of the Civil Service Commission on 2/21/2007. When Song started talking about Rule 10 violation by the Respondents, Mr.

Einheuser, a commissioner, began yelling. Song could not talk about any of the Respondents' Rule 10 violations. The tape recording done during the meeting will prove this. This is a type of obstruction of justice.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GANG SONG, Pro Se

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

No. 08-1527

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| GANG SONG, Plaintiff-Appellant, v. PAMELA TURNER, CHARLOTTE BUSH and CITY OF DETROIT, Defendants-Appellees. | ) | ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN |

ORDER

(Filed Dec. 1, 2008)

Before: MERRITT, MOORE, and COLE, Circuit Judges.

Gang Song, proceeding pro se, appeals a district court's opinion and order granting summary judgment to the defendants in his employment discrimination suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. His appeal has been referred to a panel of this court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon review, the panel concludes that oral argument is not needed. Fed. R. App. P. 34(a).

Song began working for the City of Detroit Water and Sewage Department in 1990 as an Assistant Civil

Engineer. Song was subsequently promoted to a Senior Associate Civil Engineer-Design ("Senior Engineer") and, thereafter, to a Water and Wastewater Systems Maintenance Engineer ("Maintenance Engineer"). In April 2006, in accordance with the Department's Human Resources Rule 10, Song was notified of a reduction in force because his position was subject to an upcoming layoff. Song was informed that he could accept, in the alternative to being laid off, a demotion to his former position as a Senior Engineer. Song elected to be demoted. Ultimately, 130 individuals were affected by the reduction in force. Song subsequently filed a grievance with the City of Detroit asserting that he was improperly demoted. After conducting a civil service hearing, a hearing officer concluded that Song was not improperly demoted under the reduction in force. In addition to the grievance, Song filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging race discrimination and retaliation. Thereafter, the EEOC issued Song a right to sue letter.

Song subsequently obtained counsel and filed a complaint against defendants Pamela Turner, Charlotte Bush, and the City of Detroit, alleging that the defendants discriminated and retaliated against him on the basis of his race. The defendants moved for summary judgment, and Song opposed the motion. The district court granted the defendants' motion for summary judgment because Song failed to establish a prima facie case for either racial discrimination or retaliation.

Song appealed, arguing that the district court erred in considering his pro se submissions and in granting summary judgment to the defendants. Additionally, Song asserts that he received ineffective assistance of counsel. Upon consideration, we affirm the district court's opinion and order.

As an initial matter, the defendants suggest that dismissal of Song's appeal would be appropriate because he failed to comply with the briefing requirements in Fed. R. App. P. 28. Pro se litigants' pleadings, however, are held to less stringent standards than the formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Therefore, we decline to dismiss Song's appeal on this ground.

Song first argues that the district court improperly considered his pro se submissions. The district court, however, expressly declined to file Song's pro se submissions. Moreover, a review of the district court's opinion and order shows that the district court independently reviewed the facts and the law before deciding the motion for summary judgment. Thus, there is no evidence that the district court improperly considered Song's pro se submissions or that its decision was impacted by these submissions.

Song also challenges the district court's grant of summary judgment to the defendants. We review a district court's grant of summary judgment de novo. *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004). Summary judgment is appropriate when the evidence presented shows "that there is no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(c)). In deciding the motion for summary judgment, we view the record in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Id.* The party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal citation and quotation omitted).

Song argues that the district court erred in granting summary judgment to the defendants on his discrimination claim because he was demoted two levels, rather than one level, in contravention of Rule 10, and union employees were treated differently and successfully challenged the reduction in force. Additionally, Song asserts that the district court erred in analyzing his claim only on the basis of the reduction in force and not considering that Turner had discriminated against him in the past, culminating in his demotion.

To succeed in a Title VII employment discrimination case, the plaintiff must present either direct evidence of discrimination or circumstantial evidence which creates an inference of discrimination. *DiCarlo*, 358 F.3d at 414. Because Song did not present direct evidence of discrimination, he must demonstrate through circumstantial evidence that the defendants discriminated against him on the basis of race. Thus,

to prevail, Song must establish the following prima facie elements: (1) he was a member of a protected class; (2) he was qualified for the position; (3) the defendants subjected him to an adverse employment action; and (4) the defendants did not subject similarly-situated persons outside the protected class to such adverse action. *Id.* at 415. Once a plaintiff successfully establishes his prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for taking the alleged adverse action. *Id.* at 414. If the defendant carries this burden, then the plaintiff must have an opportunity to establish, by a preponderance of the evidence, that the defendant's justification for the adverse employment action is merely pretextual. *Id.*

There is no dispute in the present case that Song was a member of a protected class, that he was qualified for the job from which he was demoted, and that his demotion constituted an adverse employment action. The district court properly concluded that no genuine issue of material fact remained concerning whether other similarly-situated individuals were treated differently, because Song was not demoted more levels than other employees in contravention of Rule 10, and union employees were not similarly situated to Song. All of the evidence before the district court established that Song was demoted to the last position he held before Maintenance Engineer. Song's mere allegations that there was a class of job between these two positions is insufficient to establish a genuine issue of material fact, given that he

failed to offer any evidence that the Maintenance Engineer and Senior Engineer positions were in the same occupational series or that there was an intermediate position in the series. *See Anderson,* 477 U.S. at 248.

Song also asserts that he was treated differently than union employees, who were able to successfully challenge their demotions or layoffs under the reduction in force. Song, however, never asserts that the union employees are of a different race than he is. Moreover, Song does not dispute that he was a non-union employee. Therefore, Song cannot establish that he was similarly situated to the union employees.

Song's assertion that he was not similarly situated to other employees based upon Turner's past discriminatory acts also fails. Regardless of whether Turner's allegations provide an inference of discrimination or establish that Song was not similarly situated to other employees, the defendants established a sufficient reason for his demotion that was unrelated to any past alleged racial discrimination – that a budgetary shortfall necessitated a reduction in force.

Additionally, Song argues that the district court erred in granting the defendants summary judgment on his retaliation claim because he established a prima facie case for retaliation. Song asserts that there was a causal connection between his demotion and his prior actions, given that: (1) there was money

to fund, and work for, a Maintenance Engineer, evidenced by the City's retention of consultants after his demotion to complete the duties assigned to his prior position and the City's subsequent posting of a vacancy position for his prior position; (2) the defendants planned to demote him well before the reduction in force was announced; and (3) Turner had consistently given preference to other employees over Song.

To establish a prima facie case of retaliation, a plaintiff must show that: (1) he engaged in an activity protected by Title VII; (2) the activity was known to the defendant; (3) he was subjected to an adverse employment action; and (4) the adverse action occurred because of the protected activity. *DiCarlo,* 358 F.3d at 420. The parties do not dispute that Song established the first three elements, but there is no evidence that Song's demotion was the result of anything other than a reduction in force due to the budgetary shortfall. Song provides nothing other than his bare allegations that consultants were later used to complete his prior duties, that his prior position was posted after his demotion, or that his demotion was planned before the reduction in force was implemented. Song may not rest upon his mere allegations to demonstrate a material issue of fact, but must provide evidentiary material, such as depositions, affidavits, etc., pursuant to Rule 56. *See Anderson,* 477 U.S. at 248. Moreover, an employer is under no duty to retain an employee during a workforce reduction until another position or the same position becomes available later, even in the not-to-distant [sic] future. *See*

*Bender v. Hecht's Dep't Stores,* 455 F.3d 612, 622 (6th Cir. 2006). Song also points to several alleged incidents of discriminatory treatment which occurred over a year before his demotion. Although a lapse in time between the protected activity and the adverse employment action does not foreclose establishing a causal connection, it undermines such an inference. *Dixon v. Gonzales,* 481 F.3d 324, 335 (6th Cir. 2007). The record supports Song's contention that he was demoted after these alleged incidents occurred, but he fails to provide any evidence of retaliatory intent beyond this tenuous connection, except for mere speculation.

Finally, Song argues that his retained counsel was ineffective. "[T]here is no constitutional or statutory right to effective assistance of counsel in a civil case." *Keenan v. Parker*, 23 F. App'x 386, 386 (6th Cir. 2001). Thus, a litigant in a civil proceeding may not attack the underlying judgment on the basis that he received ineffective assistance of counsel. *Id.* at 387.

For the foregoing reasons, the district court's order granting summary judgment to the defendants is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GANG SONG,

Plaintiff,

v.

PAMELA TURNER, CHARLOTTE BUSH, and CITY OF DETROIT

Defendants. /

CASE NO. 06-14073
HON.
LAWRENCE P. ZATKOFF

**OPINION AND ORDER**

(Filed Mar. 31, 2008)

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 31st day of March, 2008.

PRESENT: THE HONORABLE
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

## I. INTRODUCTION

This matter is before the Court on Defendants' filing titled "Motion for Summary Judgment" (Docket #18). Although titled a "Motion for Summary Judgment," the Court notes that Defendants present a number of arguments that Plaintiff's action should be dismissed on the pleadings. Those arguments thus must be considered under Fed.R.Civ.P. 12, not Fed.R.Civ.P. 56. In any event, Plaintiff filed a response, and Defendants have replied. The Court finds

that the facts and legal arguments pertinent to Defendants' Motion are adequately presented in the parties' papers, and the decision process will not be aided by oral arguments. Therefore, pursuant to E.D. Mich. Local R. 7.1(e)(2), it is hereby ORDERED that Defendants' Motion be resolved on the briefs submitted, without this Court entertaining oral arguments. For the reasons that follow, Defendants' Motion is GRANTED.

## II. BACKGROUND

Plaintiff, an Asian national of Korean descent, has been employed by the City of Detroit Water and Sewage Department (the "Department") since 1990. Prior to 1995, Plaintiff's title was "Associate Civil Engineer – Design." In 1995, Plaintiff was promoted to "Senior Associate Civil Engineer – Design." In 1998, Plaintiff was promoted to "Water & Wastewater Systems Maintenance Engineer," and he held that position until May 2006. In the spring of 2006, the Department underwent a reduction in force due to a budget shortfall within Defendant City of Detroit (the "City"). As a result, the Department demoted or laid off over 130 employees. Plaintiff, a non-union employee, was one of employees who was demoted to a previously held position. By written notice dated April 13, 2006, the Department informed Plaintiff that his position as Water & Wastewater Systems Maintenance Engineer had "been reached for layoff." The Department gave Plaintiff the option of being laid off or accepting "A Demotion or Transfer to the formerly

held class of *Sr. Assoc. Civil Engr*[,]" with an effective date of May 8, 2006. Plaintiff selected the option of demotion to the position of Senior Associate Civil Engineer on April 21, 2006.

On April 26, 2006, Plaintiff filed a grievance through the City's Civil Service Rules. Plaintiff alleged that he was improperly demoted in violation of the City's Human Resources Rules, specifically Rule 10, which covers "Reductions in Force." For purposes of this action, the key provision is Section 2, Paragraph b, which provides:

> b. In the event it is necessary to reduce the number of permanent status employees in the class, the order of removal shall be as follows:
>
> 1. Employees in the class on a limited-term basis and employees in the class on a permanent basis who have not completed the required probationary period, but who hold permanent status in some other class, shall revert to the class in the department from which they were promoted or transferred. Removal shall be in accordance with their total City seniority, the least senior employee to be removed first.
>
> 2. Employees in the class on a permanent basis shall be removed in accordance with their total City seniority, the least senior employee to be removed first. Such employees

shall be laid off subject to the following demotion or transfer rights within the department.

a. *Demotion in Series*

If the employee is in a class in an occupational series, the employee shall have the right to be demoted to a position in a lower class in the series, provided that there are one or more employees in the lower class in the department having less total city seniority. (The least senior employee displaced as a result shall be subject to demotion, transfer or layoff in accordance with the applicable provisions of this Rule.)

b. *Demotion or Transfer to a Formerly-Held Class*

If the employee previously held permanent status in another class not in series which is at the same or lower level, the employee may elect demotion or transfer to such class, provided there are one or more employees in the class in the department having less total city seniority. (The least senior employee displaced as a result shall be subject to demotion, transfer or layoff in accordance with the

applicable provisions of this Rule.)

c. *Change of Status to Vacant Positions in Other Classes*

If the employee has exhausted his/her rights to demotion or transfer under (a) and (b) above, the department may, in so far as the interests of the service permit, propose transfer or demotion of the employee to an available vacant position in any other class in the department for which the department believes the employee is qualified. Such proposed change of status shall be subject to the approval of the Human Resources Director.

Plaintiff's grievance was processed, and a hearing was conducted before a hearing officer, John Obee ("Mr. Obee"), agreed upon by Plaintiff and the City. Plaintiff was given an opportunity to present his case and any evidence in support of his case at that hearing. Plaintiff's grievance was denied by Mr. Obee in January 2007. In March 2007, Plaintiff was notified that Mr. Obee's conclusion and findings of fact had been adopted by the Civil Service Commission of the City's Human Resources Department (the "Commission").

In addition to the above grievance, Plaintiff filed a charge with the Equal Employment Opportunity Commission on May 25, 2006, wherein he alleged race discrimination and retaliation. Plaintiff was issued a right to sue letter in August or early September 2006. On September 15, 2006, Plaintiff, proceeding in pro per, filed the instant action in this Court, alleging that the City, Pamela Turner ("Turner") and Charlotte Bush ("Bush") (a) discriminated against him on the basis of race when demoting him, and (b) demoted him in retaliation for his complaints about racially preferential treatment Turner had received and/or engaged in during the decade preceding Plaintiff's demotion.

## III. LEGAL STANDARD

### A. Fed.R.Civ.P. 12

A motion brought pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted tests the legal sufficiency of the plaintiff's complaint. The Court must accept as true all factual allegations in the complaint, and any ambiguities must be resolved in the plaintiff's favor. *Jackson v. Richards Medical Co.*, 961 F.2d 575, 577 (6th Cir. 1992). A district court's grant of a motion to dismiss is proper when there is no set of facts that would allow the plaintiff to recover. *Carter by Carter v. Cornwall,* 983 F.2d 52, 54 (6th Cir. 1993).

**B. Fed.R.Civ.P. 56**

Summary judgment is appropriate only if the answers to the interrogatories, depositions, admissions, and pleadings, combined with any affidavits in support show that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law. *See* FED. R. CIV. P. 56(c). A genuine issue of material fact exists when there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citations omitted). In application of this summary judgment standard, the Court must view all materials supplied, including all pleadings, in the light most favorable to the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

The moving party bears the initial responsibility of informing the Court of the basis for its motion and identifying those portions of the record that establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the non-moving party must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial. *See* FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324. The nonmoving party must do more than show that there is some metaphysical

doubt as to the material facts. It must present significant probative evidence in support of its opposition to the motion for summary judgment in order to defeat the motion for summary judgment. *See Moore v. Phillip Morris Co.*, 8 F.3d 335, 339-40 (6th Cir. 1993).

## IV. ANALYSIS

### A. No Dismissal on the Pleadings

In their Motion, Defendants set forth several reasons why they believe this case should be dismissed on the pleadings. The Court rejects such arguments, however, for two reasons. First, this case was filed 18 months ago. An answer was filed, a scheduling conference was held and discovery was conducted. During that period, Defendants never (1) raised the issue of the failure of Plaintiff to adequately plead his case, (2) filed a motion for a more definite statement of the allegations set forth in the complaint pursuant to Fed.R.Civ. P. 12(e) (Plaintiff, initially proceeding in pro per, completed a form "Eastern District of Michigan Complaint and Motion for Other Relief" (the "Form Complaint")), or (3) demanded that an amended and clear complaint be filed (even after Plaintiff hired an attorney).

Second, and more importantly, the pleadings in this matter were filed by a *pro se* plaintiff. As such, the pleadings are to be construed liberally. *See Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999).

Significantly, Paragraph 1 of the Form Complaint states:

> This action is brought pursuant to Title VII of the Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972) for employment discrimination. Jurisdiction is specifically conferred on this Court under 42 U.S.C. § 2000e-5. Equitable and other relief are also sought under 42 U.S.C. § 2003-5(g).

Further, in the Form Complaint, Plaintiff (1) indicated that he had filed charges with the Equal Opportunity Commission and obtained a right to sue letter, (2) stated that he believed he was discriminated against on the basis of race because of his demotion and the demotion was in retaliation for complaining about discriminatory treatment within the Department, and (3) attached a 15 page document describing the acts which he believed demonstrated racial discrimination and retaliation. Accordingly, contrary to Defendants' assertions, the Court concludes that:

a. The Court has subject matter jurisdiction over this matter, as a federal question was pled in the Form Complaint, as evidenced above;

b. Defendants' discussion of diversity jurisdiction is misplaced in this Title VII action; and

c. Plaintiff did not fail to state a claim upon which relief can be granted.

The Court now turns to Defendants' assertions that Plaintiff's case should be dismissed on summary judgment pursuant to Fed.R.Civ.P. 56.

### B. Race Discrimination Claim

Pursuant to Title VII, 42 U.S.C. § 2000e-2(a)(1), Plaintiff claims that Defendants discriminated against him on the basis of race when demoting him in 2006.

#### *1. Standard for Discrimination Claims*

In deciding a motion for summary judgment, Plaintiff's discrimination claims are to be evaluated under the *McDonnell-Douglas/Burdine*[1] formula, discussed below. It is the plaintiff's burden to establish a prima facie case of discrimination, and a plaintiff must establish discriminatory animus was a motivating factor in the employer's action. *Jacklyn v. Schering-Plough Healthcare Prod. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999) A claim of discrimination can be established either by direct evidence of discrimination or circumstantial evidence creating an inference of discrimination. *Id.*

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[1] *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981).

*2. Direct Evidence*

Direct evidence is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *See Jacklyn,* 176 F.3d at 926 (citations omitted); *See also Sniecinski v. BCBSM,* 469 Mich. 124, 133 (2003) (quoting *Hazle v. Ford Motor Co.,* 464 Mich. 456, 462 (2001)). Moreover,

> [direct evidence] does not require the fact finder to draw any inferences to reach that conclusion. . . . For example, proof of "a facially discriminatory employment policy or a corporate decision maker's express statement of a desire to [avoid hiring] employees in the protected group is evidence of discriminatory intent." . . . Evidence of discrimination is not considered direct evidence unless a racial motivation is explicitly expressed.

*Amini v. Oberlin College,* 440 F.3d, 359 (6th Cir. 2006) (citations omitted). In his brief, Plaintiff does not explicitly direct the Court's attention to any particular statement which constitutes direct evidence of race discrimination. After reviewing the record in this case, the Court finds that there are no allegedly discriminatory statements made by Turner, Bush or any person employed by the City). Plaintiff also fails to direct the Court to any policy of the City, and the Court's scouring of the record uncovered no policy of the City, that expressed a desire by the City to demote, layoff, or avoid hiring persons in the protected

class to which Plaintiff claims to belong (Asian/ Korean).

Accordingly, the Court concludes that Plaintiff has not offered any direct evidence that Defendants demoted him on the basis of his race.

*3. Circumstantial Evidence*

In the absence of direct evidence of discrimination, a plaintiff must proceed through the steps set forth in *McDonnell-Douglas v. Green,* 411 U.S. 792, 802 (1973). Under *McDonnell-Douglas,* a plaintiff can proceed upon presenting evidence from which a factfinder could infer that the plaintiff was the victim of unlawful discrimination. *See Hazle,* 464 Mich. at 462; *DeBrow v. Century 21 Great Lakes, Inc. (on reh.),* 463 Mich. 534, 537-38 (2001). Under this circumstantial evidence approach, a plaintiff can establish a *prima facie* case of discrimination by showing that:

(1) he was a member of a protected class;

(2) he suffered an adverse employment action;

(3) he was qualified for the position; and

(4) he was treated differently from similarly situated persons outside the protected class.

*See, e.g., Anthony v. BTR Auto. Seal. Syst.,* 339 F.3d 506, 515 (6th Cir. 2003); *Jacklyn,* 176 F.3d at 928. *See*

*also Reeves v. Sanderson Plumb. Prod., Inc.*, 530 U.S. 133, 143 (2000).

"The establishment of a *prima facie* case creates a rebuttable presumption of discrimination and requires [the employer] to articulate some legitimate, nondiscriminatory reason for taking the challenged action." *Anthony*, 339 F.3d at 515. "If the defendant can respond with such a reason for the adverse employment action, the plaintiff has the burden of offering evidence that the defendant's justification is a pretext that masks its true discriminatory intent." *Amini*, 440 F.3d at 359-60; *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 574 (6th Cir. 2003) (en banc). A plaintiff may establish pretext "by showing that the [defendant's] proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Wexler*, 317 F.3d at 576 (quoting *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000)).

*4. Race Claim*

There is no dispute that Plaintiff satisfies the first three prongs of the four-part *prima facie* showing required under *McDonnell-Douglas* and its progeny. Plaintiff was a member of a protected class (Asian/Korean), and he suffered an adverse employment action (demotion). Likewise, Defendants do not contest that Plaintiff was qualified for the position he held prior to the demotion (Water & Wastewater

Systems Maintenance Engineer). Defendant argues, however, that there is no evidence to support the fourth prong under *McDonnell-Douglas* and its progeny, *i.e.*, that Plaintiff was treated differently than similarly situated persons not in the protected class. The Court agrees.

Plaintiff argues that he was "double demoted" in contravention of Rule 10 of the Human Resources Rules, while "a comparable non-Asian employee with less seniority was demoted only one grade, a violation of Title VII of the Civil Rights Act." In support of that argument, Plaintiff states that M.A. Matthew was demoted only one level, from Senior Associate Electrical Engineer to Senior Assistant Electrical Engineer, despite the fact that Plaintiff had more seniority than Mr. Matthew (Mr. Matthew was hired in 1997, seven years after Plaintiff). Plaintiff states that Mr. Matthew is a different race than Plaintiff. Plaintiff does not identify Mr. Matthew's race, stating only that Mr. Matthew was an "American national." The Court was unable to discern Mr. Matthew's race in any document filed in this matter. For purposes of this Opinion, however, the Court shall assume that Mr. Matthew is of a different race than Plaintiff.

The Court cannot conclude, however, that the record supports Plaintiff's claim that Plaintiff was "double demoted" or demoted two levels. Rather, just like Mr. Matthew, Plaintiff was demoted to the immediately available level below that which he was

working at the time of the reduction in force.[2] In the case of Plaintiff, he was demoted from Water and Wastewater Systems Maintenance Engineer to Senior Associate Civil Engineer – Design. This demotion, from Water and Wastewater Systems Maintenance Engineer to Senior Associate Civil Engineer – Design, is clearly set forth in (a) Exhibit 2 to Plaintiff's Response (Plaintiff's Employee History File dated June 29, 2006), which is also Exhibit 1 to Defendants' Motion, (b) Exhibit 8 to Defendants' Motion (the April 13, 2006 Notice of Reduction in Force Rights), and (c) the grievance procedure and hearing documentation attached to Defendants' Motion (specifically, Exhibit 5).

Even the document Plaintiff relies on to demonstrate that he was double demoted reveals that he was not demoted two levels as he claims. The DWSD (Detroit Water and Sewer Department) Internal

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[2] Based on a review of Exhibit 10 to Defendants' Motion (Exhibit 4 to Plaintiff's Response), which is titled "DWSD Internal Spreadsheet," it appears to the Court that Mr. Matthew actually may have been demoted two levels. According to that document, Mr. Matthew's most recent position prior to being Senior Associate Electrical Engineer was Associate Electrical Engineer. It is unclear from the DWSD Internal Spreadsheet whether the Associate Electrical Engineer position still existed at the time of the 2006 reduction in force, but it is clear that no one else was put in that position during the reduction in force and that the one employee who was in that position at the time of the reduction in force was laid off. In any event, it is clear that Mr. Matthew was demoted at least one available level, just as Plaintiff was.

Spreadsheet is attached to Plaintiff's Response as Exhibit 4 and Defendants' Motion as Exhibit 10. The DWSD Internal Spreadsheet is dated April 27, 2006, and it reveals that (1) Plaintiff's then-current classification was "Water & Wastewater Systems Maintenance Engineer", (2) Plaintiff's "Previous Class[ification] Held [was] Sr. Assoc Civl Eng Design, Assoc Civil Engr Design," and (3) the "Action Taken" with respect to Plaintiff pursuant to the reduction in force was to "Demote [Plaintiff to] Sr. Assoc. Civil Eng. Design[.]" Significantly, the DWSD Internal Spreadsheet further provides that Plaintiff's demotion would displace employee Mohammed Hasnain, such that Mr. Hasnain would be demoted from "Sr. Assoc. Civ. Eng. Design" (the position to which Plaintiff was demoted) to "Assoc. Civil Eng. – Design[.]" Accordingly, it was Mr. Hasnain, not Plaintiff, who was demoted to Associate Civil Engineer – Design. Plaintiff was simply demoted one level, to Senior Associate Civil Engineer. Finally, as the DWSD Internal Spreadsheet reveals, more than 130 employees were being demoted or laid off in the spring of 2006, in the same manner that Plaintiff was.

Plaintiff next asserts that Section 2.b.2.a. of Rule 10 (and not Section 2.b.2.b.) should have governed his situation because the positions of Water & Wastewater Systems Maintenance Engineer and Senior Associate Civil Engineer – Design are in the same occupational series, with the latter position constituting a two level demotion from the former position. Plaintiff argues that there is an intermediate position

in that occupational series continuum, *i.e.*, the position of Engineer of Water Systems. Plaintiff offers no evidence in support of his contention that the Senior Associate Civil Engineer – Design position and the two Water Systems Engineer positions were in the same occupational series. Even if all three positions were in the same occupational series, however, Plaintiff ignores (a) the fact that no one was placed in the position of Engineer of Water Systems during the restructuring under the reduction in force, (b) his acknowledgment at the grievance hearing before Mr. Obee that Plaintiff could not have bumped the persons, if any, who held Engineer of Water Systems positions, and (c) the fact that Plaintiff never held the position of Engineer of Water Systems (which inexplicably means that Plaintiff jumped from Senior Associate Civil Engineer – Design to Water & Wastewater Systems Maintenance Engineer in 1998). The Court therefore finds that this argument lacks merit.

There are no other allegations, nor is there any other "evidence" in the record, that non-Asian persons were treated differently than Plaintiff. At page 13 of the document he attached to the Form Complaint, Plaintiff states that "only two (me and Mr. B.H., both were reporting to Ms. Turner) among all non-union engineers in the Department were demoted or laid off . . . " This allegation, like the others presented by Plaintiff, fails to demonstrate that his race had anything to do with his demotion. On page 13 of the document he attached to the Form Complaint, Plaintiff also states that "Status Change Approval, dated

May 15, 2006, demoting me to a previously held classification, noted that the reason for my demotion was Lack of Work or Lack of Funds (Reason Code 251). This reason makes no sense for the following reasons from (a) to (g)." The Court notes that none of the reasons (a)-(g) set forth by Plaintiff identify any person other than Turner (as decision maker) or a Ms. Joshi (for whom he used to do work). At no point in the Form Complaint, the document attached thereto, or in Plaintiff's formal response briefs (or even in Plaintiff's *pro se* submissions (*see* Section IV. C., *infra*)) is there any indication of how Asians were treated differently than non-Asians. Specifically, Plaintiff does not show that non-Asians were spared similar demotions or lay offs pursuant to the reduction in force action taken by the Department and/or the City.

Plaintiff also makes frequent references to how union employees (as opposed to Plaintiff, a non-union employee) were able to successfully challenge the reduction in force demotions and/or lay-offs. In conjunction with such arguments, however, Plaintiff does not contend that the union employees were of a different race than he was. Therefore, even if union employees were successful in challenging demotions while non-union employees such as Plaintiff were not, such disparate treatment does not implicate or support a claim of racial discrimination.

Accordingly, for the reasons set forth above, the Court concludes that Plaintiff has not established a *prima facie* case of race discrimination. The Court

therefore grants Defendants' Motion as it relates to Plaintiff's race discrimination claim.

### C. Retaliation Claim

In order to establish a claim of retaliation under Title VII:

> A plaintiff must now prove that: (1) [he] engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. . . . If and when a plaintiff has established a *prima facie* case, the burden of production of evidence shifts to the employer to "articulate some legitimate, nondiscriminatory reasons" for its actions. . . . The plaintiff, who bears the burden of persuasion throughout the entire process, then must demonstrate "that the proffered reason was not the true reason for the employment decision."

*Morris v. Oldham Cty. Fiscal Court,* 201 F.3d 784, 792-93 (6th Cir. 2000).

Plaintiff has satisfied the first three elements for a *prima facie* retaliation claim, at least for purposes of surviving summary judgment when all evidence

must be construed in his favor. In the document he attached to the Form Complaint, Plaintiff repeatedly referenced instances where he publicly complained that (1) Turner received "extraordinary racial preferential treatment," including getting an undeserved promotion and being given a City car, and (2) Turner had taken hostile and adverse actions against Plaintiff over the years for work and non-work matters, including his career advancement even prior to the demotion. The Court notes that Defendant has not disputed any of these contentions. Therefore, in construing the evidence in a light most favorable to Plaintiff in deciding this Motion, *see Matsushita, supra,* the Court concludes that Plaintiff engaged in protected activity when he complained of discriminatory treatment in favor of and by his supervisor, Turner. *See, e.g., Burkhardt v. BCBSM,* 1999 WL 33455100, at *1; *Ross v. Memphis,* 394 F.Supp.2d 1024, 1034 (W.D. Tenn. 2005).

The protected activity was known to Defendants, as it is not disputed that (1) Plaintiff wrote a letter to the City Human Resources Department Director in 2000 about allegedly racially preferential treatment in promotions, (2) Plaintiff spoke to Turner in 2004 about allegedly improper use of City cars, and (3) multiple incidents concerning Plaintiff having the ability to report to Ms. Joshi (rather than Turner) were communicated to and/or involved Turner in 2004. Again, Defendants do not dispute Plaintiff's contentions that his protected activity was known to them. Finally, Plaintiff clearly suffered an adverse

employment action when he was demoted in 2006. The issue for the Court, therefore, is whether Plaintiff can satisfy the fourth prong of a *prima facie* Title VII retaliation case, *i.e.*, is there evidence of a causal connection between the protected activity and Plaintiff's termination? For the reasons that follow, the Court concludes there is no evidence of causal connection that can be inferred in this case.

As set forth above, the Court concluded that Plaintiff engaged in protected activity by complaining that Turner received preferential racial treatment and engaged in discriminatory activity. Plaintiff has not, however, offered any evidence that his demotion was tied to his complaints. First, there has been no evidence presented which would demonstrate that Plaintiff's demotion was the result of anything other than a Department-wide reduction in force due to budget shortfalls within the City. Second, it is undisputed that approximately 130 other Department employees were laid off, displaced and/or demoted. As such, Plaintiff was not singled out for adverse employment action and, if fact, many persons were laid off rather than simply demoted.

Third, there is no evidence that would suggest that Turner (or anyone else) demoted Plaintiff, or advocated the demotion of Plaintiff, because of any complaints he made in the past. Finally, all of the incidents referenced by Plaintiff occurred more than a year before the Department's reduction in force plan was announced and implemented in the spring of 2006. As such, there is no temporal proximity of the

alleged incidents upon which a retaliation claim might be based to Plaintiff's demotion. *See Little v. BP Explorations & Oil Co.*, 265 F.3d 357, 364 (6th Cir. 2001); *Nguyen v. City of Cleveland*, 229 F.3d 559, 566 (6th Cir. 2000); *Cooper v. City of N. Olmstead*, 795 F.2d 1265, 1272 (6th Cir. 1986).

Accordingly, for the reasons stated, the Court concludes that Defendants are entitled to summary judgment on Plaintiff's retaliation claim.

**D. Miscellaneous**

The Court notes that subsequent to the reply brief filed by Defendants, the named Plaintiff mailed five separate documents directly to the Court (collectively, the "*Pro se* submissions"), copying only his counsel on the first two submissions (the second submission was filed the day after the first submission and essentially corrected typos in the first submission) and copying his counsel and Defendants' counsel on the last three submissions. The Court has not received any comment from either counsel with respect to the *Pro se* submissions. The Court has reviewed the *Pro se* submissions and notes that, even if considered by the Court, they have no effect on the Court's analysis set forth above.

Absent consent of the Court, however, a party is not entitled to file a response to a reply filed by the other party. *See* Fed.R.Civ.P. 7; E.D. Mich. L.R. 7.1(a), (b) and (c)(1)(A). In addition, Plaintiff is represented by counsel in this matter, and it is improper for a

plaintiff to make *pro se* filings when represented by counsel. Accordingly, Plaintiff's *pro se* submissions filed after Plaintiff retained counsel are hereby declined by the Court. Finally, the Court hereby ORDERS the named Plaintiff, Gang Song, to refrain from filing any additional materials on a *pro se* basis so long as he is represented by counsel.

## V. CONCLUSION

Accordingly, and for the reasons set forth above, the Court hereby GRANTS Defendant's Motion for Summary Judgment. Judgment shall be entered accordingly.

IT IS SO ORDERED.

s/ Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES
DISTRICT JUDGE

Dated: March 31, 2008

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Order was served upon the attorneys of record by electronic or U.S. mail on March 31, 2008.

s/ Marie E. Verlinde
Case Manager
(810) 984-3290

CITY OF DETROIT
CIVIL SERVICE COMMISSION

IN THE MATTER BETWEEN:

GANG SONG,

Grievant,

Grievance No.: 05-045

and

THE CITY OF DETROIT,

Employer.

---

**HEARING OFFICER'S FINDINGS AND RECOMMENDATIONS**

**Appearances:**

For the City of Detroit: Letitia Jones, Assistant Corporation Counsel

For the Grievant: Gang Song

**Witness Called by the City of Detroit:**

Louis Fischione – Human Resources Consultant

Pamela Turner – Assistant Director – Water Department

**Witness Called by the Grievant:**

Gang Song

## INTRODUCTION

This matter was referred for hearing pursuant to the Civil Service Rules and Regulations of the City of Detroit. A hearing was held on December 15, 2006. The parties were afforded ample opportunity to examine and cross-examine witnesses, to present documentary evidence and to argue their respective positions. The witnesses testified under oath.

## ISSUE

Whether there was "just cause" or a "reasonable basis" for the notice of demotion served upon the Grievant on April 13, 2006? If not, what remedy?

## STATEMENT OF FACTS

It is undisputed that the Grievant, Gang Song, was a fairly long term employee of the City of Detroit, with 16 years of seniority as of April 13, 2006. Mr. Song began his employment with the City of Detroit on April 6, 1990, as an Assistant Civil Engineer. Over the years, the Grievant received a number of promotions, including to Senior Associate Civil Engineer-Design on September 5, 1995 and to Water and Wastewater Systems Maintenance Engineer on June 30, 1998.

According to the testimony of Louis Fischione of the Human Resources Department, there had been at one time three engineers including Mr. Song, in the classification of Water and Wastewater Systems

Maintenance Engineer. One of the positions had been vacated a number of years prior to the issues in this Arbitration and was never filled. The second position had been filled by a Ronald Schultz, who Mr. Fischione believed retired sometime in 2005. This second position was also not filled, although evidence was admitted at the hearing by the Grievant, Grievant Exhibit 1, that a posting had been made for the Water and Wastewater Systems Maintenance Engineer, with Class Code: 14-40-55, in November, 2005, but that posting had been inexplicably withdrawn. That left, as of April 2006, the only party filling a Water and Wastewater Systems Maintenance Engineer position, the Grievant.

The Grievant testified that over the years of his working in the Maintenance Engineer position, he performed a number of tasks, under the supervision of a Ms. Joshi, who was the manager of the Construction Evaluation Division. He was also supervised by Pamela Turner, the Assistant Director of Water Supply. Much of the work performed by Mr. Song involved special projects, According to Mr. Song's testimony at the hearing, when Ms. Joshi retired in September of 2005, things changed for him. The Grievant testified that most of his projects dried up and other projects that he could have performed were not assigned to him. He testified that assignments that he had previously received were no longer given to him. He attributed his lack of work to his supervisor, Ms. Turner. He believed, but offered no corroborating testimony or documentary evidence,

that Ms. Turner had a personal animosity against him and this was why he was not receiving work. Ms. Turner testified at the hearing and denied Mr. Song's allegations. She asserted that work was designated for assignment according to need and that any change in assignments or differing assignments was not based upon any personal animus towards the Grievant.

Ms. Turner testified that in March of 2006, the Director of the Water Department met with all supervisors, including Ms. Turner. Due to a lack of funds, a reduction in work force would be necessary. All supervisors were asked to review positions within their areas to see what staffing could be cut in order to remain fiscally solvent. According to Ms. Turner, because of certain ongoing needs in the Department, certain positions could not be cut and those positions involved Treatment, Monitoring and Maintenance. While Mr. Song's position had the word "Maintenance" in its title (Water and Wastewater Systems Maintenance Engineer), he was not involved in maintenance activities, but rather was involved in special projects.

According to Ms. Turner, she reviewed her department and determined that two positions could be cut, the position held at that time by the Grievant and the position of Chemical Engineer, held by Bahi

Habib.[1] No Head Engineer or Full Engineer positions were cut, as the persons in those classifications were necessary for the continuing operation of the Department.

After Ms. Turner made her review, her recommendation was then turned over to the head of her Department who made the ultimate decision. The head of the Department then referred the matter to the Human Resources Department for implementation.

The Human Resources Department issued notices to all of the employees to be affected by the RIF. In a notice, entitled NOTICE OF REDUCTION IN FORCE RIGHTS, sent out on April 13, 2006, to the Grievant, the Grievant was advised that his position had been "reached for layoff." He was advised that, pursuant to Human Resources Rule 10, he had the following rights within the Detroit Water and Sewage Department:

> A Demotion or Transfer to the formerly held class of Sr. Assoc. Civil Engr. at a salary of $65,900.

---

[1] It should be noted that while the two positions held by Mr. Song and Mr. Habib were the only two positions eliminated in Ms. Turner's department, the RIF affected numerous other employees within the Water Department, as evidenced by Department Exhibit 3, which outlined all of the employees who were cut or demoted in addition to Mr. Song and Mr. Habib.

It is undisputed that the status change was to be effective May 8, 2006. It is also undisputed that at the same time that Mr. Song received his notice of "demotion," Bahi Habib, the Chemical Engineer, received notice that he was being laid off.

A meeting was held on April 21, 2006, with the Grievant to discuss the Notice of the Reduction in Force. Depending on whose version of events is to be believed, the meeting at times became quite contentious. Present at the meeting was Mr. Song, Ms. Turner and Mr. Fischione. Mr. Fischione testified that he conducted the meeting and advised the Grievant that he was one of 130 employees who were affected by the RIF. Mr. Fischione advised that the Grievant's position was being eliminated, due to lack of funding and lack of work. Mr. Song testified that he disputed both of the alleged bases for his demotion. He testified that work that he could have done was not being given to him and that he had other experience that could be utilized that was not being properly utilized, as outside consultants were being hired. At the Hearing, Ms. Turner testified that because Mr. Song's activities for the most part involved special projects, the amount of work available had diminished and the general lack of funds made his position and that of Mr. Habib's expendable.

Mr. Song asserted further, without supporting evidence, that his whole position was eliminated, as there were no Maintenance Engineers left in the Department, as the other two positions had not been previously filled. He felt that he was being specially

targeted by Ms. Turner but he could not explain how this was, in light of the fact that Mr. Habib was faced with a layoff (he ultimately was allowed to retire) and Mr. Song was able to bump back into his formerly held position.

In addition, Mr. Song testified that none of the Full Engineers or the Head Engineers were affected by the RIF. Mr. Song did concede, on cross examination, that he could not have "bumped" any of the Full Engineers because all of the Full Engineers and Head Engineers had more seniority than him.

Lastly, as proof that he was being singled out unfairly, Mr. Song introduced Exhibit 1, which was a Notice of PROMOTIONAL OPPORTUNITY ANNOUNCEMENT for the position of Water and Wastewater Maintenance Systems Engineer, issued on August 3, 2006, after he was demoted. The City representatives testified that this posting was routine, that no Water and Wastewater Maintenance Systems Engineer position was actually filled and that there was no reason to assume that Mr. Song would not be considered for the position, assuming he had applied, only that no one had been considered or placed in the position.

## HUMAN RESOURCES RULE APPLICABLE TO THE PRESENT GRIEVANCE

The following Human Resources Rule is applicable to an analysis of this grievance:

# HUMAN RESOURCES DEPARTMENT
# RULE 10
# REDUCTION IN FORCE

## SECTION 1. Reduction in Force Terms Defined

a. A ***reduction in force*** is a reduction in the number of employees in a given class in a department of the City for lack of work, lack of funds, or reasons other than the acts or delinquencies of employees.

* * * *

## SECTION 2. ORDER AND MANNER OF REDUCTION

Reduction in force shall be by class in a department and shall be made from among all employees in the same class in that department.

* * * *

2. Employees in the class on a permanent basis shall be removed in accordance with their total City seniority, the least senior employee to be removed first. Such employees shall be laid off subject to the following demotion or transfer rights within the department.

   a. ***Demotion in Series***

   If the employee is in a class in an occupational series, the employee shall have the right to be demoted to a position in a lower class in the series, provided there are one or more employees in the lower class in the department having less total city

seniority. (The least senior employee displaced as a result shall be subject to demotion, transfer or layoff in accordance with applicable provisions of this Rule.)

An employee who waives his right to demotion to the next lower class in series and is laid off, shall lose all rights to city-wide displacement as provided for in Section 3 and restoration rights as provided for in Paragraph a. of Section 4.

## FINDINGS OF FACT

The issues in this hearing are somewhat straightforward. The City takes the position that a Reduction in Force was necessary due to both lack of work and lack of funds. The City asserts that it followed all of its rules for Reductions in Force and among the 130 employees affected by the Reduction in Force, the Grievant, Gang Song, was demoted from his position as Water and Wastewater Systems Maintenance Engineer to the position he had previously held as Senior Associate Civil Engineer-Design. The Grievant, on the other hand, asserts that he was singled out, that he was the only person in his classification, and that classification was effectively eliminated by his demotion. All of this was done because of some alleged personal bias on the part of the Grievant's supervisor, Pamela Turner. The problem with the Grievant's position, other than his own say so, the Grievant has produced no cooborating [sic] or documentary evidence to support his claim.

The evidence shows that in enacting the Reduction in Force, the City followed Human Resources Department Rule 10. The City asserts that the reduction in force as it relates to the Grievant was both because of lack of work and lack of funding. While the Grievant claims that there was work and there was funding, he provides no evidence in support of his assertions. Indeed, some of his own testimony, offered for a different reason, corroborates the City's position. The Grievant testified that he did not have projects to work on. He claims that he was not given work because of his supervisor's bias. He did not produce evidence supporting his bias theory and the fact that he didn't have projects to work on suggests that the City's rationale was, indeed, correct in this instance, i.e., that there was a lack of work, justifying his demotion.

The manner in which the reduction in force was carried out, also appears to be consistent with Rule 10. The Grievant's position was eliminated. The Grievant asserts that this elimination was effectuated to target him specifically, because no one remained in the position of Water and Wastewater Systems Maintenance Engineer. The fact that no one remained in the position is not evidence that the Grievant was targeted but rather evidences that there was not a need, at that time and under those circumstances, for anyone to fill that position. Indeed, the two other Maintenance Engineer positions had remained vacant for some time prior to April 2006,

again indicating that there was not a need for such position, at that time.

Further, Mr. Song was not the only person under Ms. Turner's supervision whose position was eliminated. Unlike Mr. Habib, however, the Chemical Engineer who was to be laid off, Mr. Song had options under Rule 10 to take a demotion and bump someone from the position that he previously held, as Senior Associate Civil Engineer-Design. In this circumstance, the system worked as it was designed to work. Further, the fact that no "Full" Engineers or "Head" Engineers were laid off is not significant in this context, as the Grievant admitted that all such persons in those categories had more seniority than him and, thus, he could not have bumped any of those persons.

Lastly, although superficially there is some question as to why the City of Detroit would do a posting in August 2006 for a position that it had eliminated in April 2006, such posting in and of itself does not provide support for the Grievant's position. While the position was posted, the Grievant was not barred from applying. Indeed, the position has not been filled. No evidence was adduced that the Grievant will not be considered for the position, assuming that the position is ever filled.

## RECOMMENDATION

On this record taken as a whole, the City was in compliance with Human Resources Rule 10 in the

manner which the Reduction in Force was carried out. The Grievant has produced no evidence in support of his position that the RIF was somehow carried out improperly as it relates to him; and, therefore, this Hearing Officer recommends that the Grievance be denied.

Respectfully submitted:

/s/ John A. Obee
John A. Obee
Hearing Officer

January 15, 2007

No. 08-1527

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| GANG SONG, Plaintiff-Appellant, | ) | ORDER |
| v. | ) | (Filed Feb. 24, 2009) |
| PAMELA TURNER, ET AL., Defendants-Appellees. | ) | |

**BEFORE:** MERRITT, MOORE, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/s/ Leonard Green
Leonard Green
Clerk

**DETROIT FIELD OFFICE**
**INTAKE QUESTIONNAIRE**

* * *

**DATE OF BIRTH:** [Date Of Birth Omitted] **SEX:** M x F ____

**RACE:** ____ BLACK ____ WHITE x ASIAN/PACIFIC ISLANDER

____ AMERICAN INDIAN/ALASKAN NATIVE ____ OTHER RACE

**NATIONAL ORIGIN:** __ MEXICAN __ HISPANIC __ EAST INDIAN x OTHER (Specify) [Korea]



1. **What is the reason for your claim of employment discrimination?**

*FOR EXAMPLE, if you feel you were discriminated against and treated less favorably than younger employees, you should check (✓) **AGE**. If you feel that you were discriminated against and treated less favorably than those not of your race, you should check (✓) **RACE**. If you feel the discrimination was due to multiple reasons, such as your race and age, you should check (✓) **both RACE and AGE**.*

__ Sex x Race __ Age __ Disability __ National Origin __ Color __ Religion

x Retaliation _____ Other (Specify)

*If your claim is based on a **DISABILITY**, see the receptionist for the **AMERICANS WITH DISABILITIES ACT SUPPLEMENTAL QUESTIONNAIRE**. Continue with this questionnaire and then complete the supplement.*

**Provide the name of a person at different address who we can contact if we are unable to reach you:**

**NAME** _____ **RELATIONSHIP** _____

**ADDRESS** _____ **CITY** _____

**STATE** _____ **ZIP** _____ **PHONE** (_____) _____

2. **Exactly how were you discriminated against? Include the date(s) of harm or action(s) and include the name(s) and title(s) of any all persons who caused them. (Example: 10/4/99 – Written Warning from Supervisor)**

A) Date 4/21/2006 Action Demotion and transfer under the name of Reduction in Force.

Person(s) Responsible Ms. Pamela Turner

B) Date _____ Action _____

Person(s) Responsible _____

C) Date _____ Action _____

Person(s) Responsible _____

3. **Employment Data** (Complete as many items as you can)

DATE HIRED 4/1990 JOB TITLE AT HIRE Assistant Civil Engineer PAY RATE $27,000/year (?)

JOB TITLE AT TIME OF DISCRIMINATION Maintenance Engineer PAY RATE $75,700/year

NAME AND TITLE OF IMMEDIATE SUPERVISOR Ms. Pamela Turner, Assistant Director

**4. What reason(s) did the employer give for the acts you consider discriminatory?**

Ms. Pamela Turner used Reduction in Force to demote and transfer me. I believe that this decision was, at least partially, affected by her desire ~~to desire~~ to retaliate me for what I wrote and said about the extraordinary preferential treatment she got some of which at the expense of me.

* * *

## DECLARATION

**I have read and had an opportunity to correct this Intake Questionnaire and swear under penalty of perjury that these facts are true and correct to the best of my knowledge and belief.**

/s/ Gang Bog Song
**Charging Party's Signature**

5/25/2006
**Today's Date**

| CHARGE OF DISCRIMINATION | Charge Presented To: | Agency(ies) Charge No(s): |
|---|---|---|
| This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form. | ☐ FEPA<br>☒ EEOC | 471-2006-01898 |

**Michigan Department of Civil Rights** and EEOC
*State or local Agency, if any*

| Name (*Indicate Mr., Ms., Mrs.*) | Home Phone No. (*Incl. Area Code*) | Date of Birth |
|---|---|---|
| Mr. Gang Song | [Omitted] | [Date Of Birth Omitted] |

| Street Address | City, State and ZIP Code |
|---|---|
| [Home Address Omitted] | |

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

| Name | No. Employees, Members | Phone No. (*Include Area Code*) |
|---|---|---|
| CITY OF DETROIT WATER & SEWAGE | 500 or More | (313) 297-6008 |

| Street Address | City, State and ZIP Code |
|---|---|
| 735 Randolph, Detroit, MI 48226 | |

| Name | No. Employees, Members | Phone No. (*Include Area Code*) |
|---|---|---|
| | | |

| Street Address | City, State and ZIP Code |
|---|---|
| | |

| DISCRIMINATION BASED ON (*Check appropriate box(es).*) | DATE(S) DISCRIMINATION TOOK PLACE | |
|---|---|---|
| | Earliest | Latest |
| ☒ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN | | |
| ☒ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER (*Specify below*) | 04-21-2006 | 04-21-2006 |
| | | ☐ CONTINUING ACTION |

THE PARTICULARS ARE (*If additional paper is needed, attach extra sheet(s)*):

I began employment with the above-named employer in April 1990, and am currently employed as a Senior Associate Civil Engineer.

During my employment, I complained that I was not afforded the same treatment as others because I was non-black.

On April 21, 2006, I was demoted by the Assistant Director allegedly because of a reduction in force. Actually, a layer of employees in a classification were skipped and I, the only member in my class (Maintenance Engineer), was targeted.

I believe I was demoted because of my race, Asian (Korean), and in retaliation for registering racial complaints, in violation of Title VII of the Civil Rights Act of 1964, as amended.

| I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures. | NOTARY – *When necessary for State and Local Agency Requirements*<br><br>I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief. |
|---|---|

| | |
|---|---|
| I declare under penalty of perjury that the above is true and correct.<br>May 25, 2006 x /s/ Gang Bog Song<br>*Date* *Charging Party Signature* | SIGNATURE OF COMPLAINT<br>x<br>SUBSCRIBED AND SWORN TO BE BEFORE ME THIS DATE (*month, day, year*)<br>05/25/06 /s/ Joseph D. Romero [investigator] |

**Notice of Reduction in Force Rights**

**TO:** Gang Song, W & W Systems
Maintenance Engr.
Water Operations

**FROM:** Michelle Martin
DWSD – Human Resources Office

**DATE:** April 13, 2006

**SUBJECT: Notice of Reduction in Force Rights**

Your position of **W & W Systems Maintenance Engr.** has been reached for layoff. In accordance with the attached **Human Resources Rule 10**, you have the following rights within the Detroit Water and Sewerage Department to:

---

**SECTION 1 – (To be completed by HR)**

1. **A Demotion Series to the Title of _____ at a salary of $_____.**

   The status change to your new title will be effective _____.

~~30.~~ [2. /s/ Louis Fischione] **A Demotion or Transfer to the formerly held class of Sr. Assoc. Civil Engr at a salary of $65,900.**

The status change to your new title will be effective **May 8, 2006**.

---

**SECTION 2 – (To be completed by Employee)**

**In accordance with Human Resources Rule 10 and/or the applicable contract provision, I understand that my failure to select one of the above-mentioned options shall result in layoff and may effect my citywide displacement and recall rights. I understand that by waiving my right, I may be deemed ineligible for unemployment benefits by the Michigan Unemployment Insurance Agency.**

☐ **I select #** 2

**OR**

☐ **I select layoff** _____

**Employee signature** /s/ Gang Bog Song

**Date** 4/21/2006

**Attachment – Rule 10**

51

(2)

No. 09-18

Supreme Court, U.S.
FILED
AUG 19 2009
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

GANG B. SONG,

*Petitioner,*

v.

PAMELA TURNER, CHARLOTTE BUSH and CITY OF DETROIT,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OR CALL COLLECT (402) 342-2831

## COUNTER-STATEMENT OF QUESTIONS PRESENTED

Has Petitioner presented compelling reasons to grant the Petition, where the granting and affirming of Respondents' motion for Summary Judgment was appropriate?

## RULE 29.6 DISCLOSURE STATEMENT

Respondent City of Detroit is a Michigan municipal corporation, which has no parent company and no corporate stock

TABLE OF CONTENTS


| | Page |
|---|---|
| COUNTER-STATEMENT OF QUESTIONS PRESENTED | i |
| RULE 29.6 DISCLOSURE STATEMENT | iii |
| TABLE OF AUTHORITIES | iv |
| INTRODUCTION | 1 |
| COUNTER-STATEMENT OF THE CASE | 2 |
| I. BACKGROUND AND SUMMARY OF THE DECISIONS BELOW | 2 |
| REASONS FOR DENYING THE PETITION | 4 |
| I. PETITIONER'S "MISSTATEMENT" HAD NO EFFECT ON THE GRANTING AND AFFIRMATION OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT | 4 |
| II. THERE WAS NO VIOLATION OF RULE 10 OF THE CITY OF DETROIT'S CIVIL SERVICE CODE | 5 |
| III. THE DISTRICT COURT REFUSED TO CONSIDER PETITIONER'S *PRO SE* SUBMISSION AND FOUND THAT, IF THEY DID, THERE WOULD BE NO CHANGE IN THE ANALYSIS | 6 |
| IV. PETITIONER'S OBSTRUCTION CLAIM WAS NOT PRESERVED FOR APPEAL | 6 |
| CONCLUSION | 7 |

# TABLE OF AUTHORITIES

Page

CASES

*McDonnell-Douglas v. Green*, 411 U.S. 792 (1973) ..... 2

*Morris v. Oldham Cty. Fiscal Court*, 201 F.3d 784 (6th Cir. 2000) ..... 3

*Taft Broadcasting Co. v. United States*, 929 F.2d 240 (6th Cir. 1991) ..... 7

*White v. Anchor Motor Freight, Inc.*, 899 F.2d 555 (6th Cir. 1990) ..... 7

OTHER AUTHORITIES

Civil Service Rule 10 from the City of Detroit Charter of 1997 ..... 5

## INTRODUCTION

Petitioner is an employee of the Respondent's Water and Sewerage Department. Petitioner currently holds the title of Senior Associate Civil Engineer – Design. This is the same title that he was promoted to in 1995 and last held in 1995.

In early 2006 the Detroit City Council refused to approve rate increases for the 2006-2007 fiscal year, which began in July 2006. The City Council did eventually approve the rate increase, but due to the delay and the notice requirement for increase in rates to the public, the Respondent's Water and Sewerage Department suffered a budget shortfall, which resulted in the demotion or layoff of over 130 employees. Mr. Song was one of the many employees who were demoted to a previously held title.

As a non-union employee, Mr. Song was able to challenge his reversion from his position as a Water Systems Maintenance Engineer to his previously held title, Senior Associate Civil Engineer – Design through the City of Detroit Civil Service Rules and the Grievance procedure. Mr. Song's grievance was processed and he was given the opportunity to present his grievance in front of a neutral third party hearing officer selected by Mr. Song and the City of Detroit. At the hearing Mr. Song was given the opportunity to present his case and any evidence, which he believed supported his claim including his allegation of race discrimination and retaliation. After the hearing Mr. Song's Grievance was denied by

the hearing officer. Later the full Civil Service Commission adopted the Hearing Officer's Report and Findings of Fact.

## COUNTER-STATEMENT OF THE CASE

### BACKGROUND AND SUMMARY OF THE DECISIONS BELOW

Petitioner Gang Song was demoted on April 21, 2006 during a reduction in force in the Water and Sewerage Department of the City of Detroit.

On May 25, 2006 Petitioner filed an EEOC charge alleging race discrimination and retaliation.

On April 26, 2006 Petitioner filed a grievance through the City of Detroit's Civil Service Rules. Petitioner's grievance was denied by the hearing officer and approved by the Commission on March 23, 2007.

Petitioner filed a lawsuit in U.S. District Court on September 15, 2006. The District Court granted Respondent's motion for Summary Judgment on March 31, 2008.

Petitioner's discrimination claim was analyzed under the *McDonnell-Douglas* test.[1] There was no dispute that Petitioner met the first three prongs of the test. He was a member of a protected class, he

[1] *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973).

suffered an adverse employment action, and he was qualified for the position. The fourth prong requires that he be treated differently from similarly situated persons outside the protected class. The Court found that there were no allegations or other evidence in the record that showed any non-Asian persons treated differently than Petitioner.

> For a retaliation claim a Plaintiff must prove that: (1) he engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment . . . If and when a plaintiff has established a prima facie case, the burden of production of evidence shifts to the employer to articulate some legitimate, nondiscriminatory reasons for its actions . . . then Plaintiff must demonstrate that the proffered reason was not the true reason for the employment.[2]

The Court determined that for the purposes of surviving summary judgment that the first three prongs were satisfied. The Court then found that there was no evidence that Petitioner's demotion was

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[2] *Morris v. Oldham Cty. Fiscal Court*, 201 F.3d 784, 792-93 (6th Cir. 2000).

tied to his protected activity. There was no evidence that the demotion was the result of anything but the reduction in force.

The District Court also looked at Petitioner's *pro se* submissions and determined that even if the Court considered them, they would have no effect on the Court's analysis.

Petitioner appealed the District Court's decision on April 15, 2008. The Court of Appeals affirmed the District Court's order granting summary judgment on December 1, 2008. Petitioner filed a petition for rehearing, which was denied on February 24, 2009.

## REASONS FOR DENYING THE PETITION

### I. PETITIONER'S "MISSTATEMENT" HAD NO EFFECT ON THE GRANTING AND AFFIRMATION OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

The District Court properly analyzed Petitioner's claim on the basis of both discrimination and retaliation. Petitioner's discrimination claim was dismissed because, the Court found that there were no allegations or other evidence in the record that showed any similarly situated persons outside the protected class. Petitioner's retaliation claim was dismissed because there was no evidence that the demotion was the result of anything but the reduction in force.

## II. THERE WAS NO VIOLATION OF RULE 10 OF THE CITY OF DETROIT'S CIVIL SERVICE CODE.

Civil Service Rule 10 applies to reduction in force.[3] Petitioner contends that his demotion violates Civil Service Rule 10 Section 2(b) 2(b). This issue was not raised or properly preserved on appeal.

Even if petitioner had properly preserved this issue, Petitioner misreads Rule 10. Section 2(b) 2(b) applies to demotion or transfer to a formerly held class.

Section 2(b) 2(b) states: "If the employee has previously held permanent status in another class not in series which is at the same or lower level, the employee may elect demotion or transfer to such class, provided there are one or more employees in the class in the department having less total city seniority."

Section 2(b) 2(b) applies when an employee previously held permanent status in another class not in series at a same or lower level. Section 2(b) 2(b) is violated when an employee who has previously held permanent status in a different class not in his current series is not allowed to accept a demotion or transfer to that class, provided the remaining requirements are also met. Petitioner accepted demotion to his previously held class, which was Senior

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[3] *See* Civil Service Rule 10.

Associate Civil Engineer – Design. Senior Associate Civil Engineer – Design is a formerly held class not in series.

Because there was no violation under Section 2(b) 2(b), this is not a compelling reason to grant Petitioner's Writ of Certiorari.

## III. THE DISTRICT COURT REFUSED TO CONSIDER PETITIONER'S *PRO SE* SUBMISSION AND FOUND THAT, IF THEY DID, THERE WOULD BE NO CHANGE IN THE ANALYSIS.

Petitioner contends that the District Court should have considered his *pro se* submissions. The District court reviewed the *pro se* submissions and noted that even if they considered them, they would have no effect on the Court's analysis. Further, the Court ordered Petitioner to refrain from filing any additional materials on a *pro se* basis so long as counsel represented him.[4]

## IV. PETITIONER'S OBSTRUCTION CLAIM WAS NOT PRESERVED FOR APPEAL.

Petitioner did not properly preserve this issue for appeal. Unless exceptional circumstances are present, this Court normally will not address an issue not

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[4] *See* District Court Decision In Petitioner's Petition for Writ of Certiorari, App. 30-31.

raised in the District Court.[5] No exceptional circumstances are present in this case. Hence, this issue should not be reviewed for the first time on appeal.

## CONCLUSION

Petitioner has not demonstrated any compelling reason for this Court to grant the Petition for Writ of Certiorari. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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*Attorney for Respondent*
*City of Detroit*

[5] *See Taft Broadcasting Co. v. United States*, 929 F.2d 240, 243-45 (6th Cir. 1991); *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559 (6th Cir. 1990).

## Civil Service Rule 10 from the City of Detroit Charter of 1997

* * *

**SECTION 2. ORDER AND MANNER OF REDUCTION**

Reduction in force shall be by class in a department and shall be made from among all employees in the same class in that department.

a. Within the department, the following categories of employees shall be removed first::

   1. Provisional employees shall be separated by terminating their services; provided, however, that employees provisionally employed in the class who hold permanent status in some other class shall revert to the class in the department from which they were provisionally promoted or transferred.

   2. Employees who have not completed their initial probationary period shall be laid off in accordance with their seniority, the least senior employee being laid off first.

   3. Employees hired on a limited-term basis shall be laid off in accordance with their seniority, the least senior employee being laid off first.

b. In the event it is necessary to reduce the number of permanent status employees in the class, the order of removal shall be as follows:

   1. Employees in the class on a limited-term basis and employees in the class on a

permanent basis who have not completed the required probationary period, but who hold permanent status in some other class, shall revert to the class in the department from which they were promoted or transferred. Removal shall be in accordance with their total City seniority, the least senior employee to be removed first.

2. Employees in the class on a permanent basis shall be removed in accordance with their total City seniority, the least senior employee to be removed first. Such employees shall be laid off subject to the following demotion or transfer rights within the department.

   a. *Demotion in Series*

      If the employee is in a class in an occupational series, the employee shall have the right to be demoted to a position in a lower class in the series, provided there are one or more employees in the lower class in the department having less total city seniority. (The least senior employee displaced as a result shall be subject to demotion, transfer or layoff in accordance with applicable provisions of this Rule.)

      An employee who waives his right to demotion to the next lower class in series and is laid off, shall lose all rights to city-wide displacement as provided for in Section 3 and restoration rights as

provided for in Paragraph a. of Section 4.

b. *Demotion or Transfer to a Formerly-Held Class*

If the employee has previously held permanent status in another class not in series which is at the same or lower level, the employee may elect demotion or transfer to such class, provided there are one or more employees in the class in the department having less total city seniority. (The least senior employee displaced as a result shall be subject to demotion, transfer or layoff in accordance with applicable provisions of this Rule.)

An election to accept a demotion or transfer to a formerly held class is optional for employees who also have a right to a demotion in series.

c. *Change of Status to Vacant Positions in Other Classes*

If the employee has exhausted his/her rights to demotion or transfer under (a) and (b) above, the department may, in so far as the interests of the service permit, propose transfer or demotion of the employee to an available vacant position in any other class in the department for which the department believes the employee is qualified. Such proposed change of status shall be subject to the

approval of the Human Resources Director.

**SECTION 3. CITY-WIDE DISPLACEMENT**

Employees with permanent status who have been laid off in a class from a city department shall displace employees of the same classification in those categories listed in Paragraph a. of Section 2 on a Citywide basis. In addition, laid off permanent employees who have one or more years of classified service shall displace other permanent employees in the same classification of lesser seniority on a City-wide basis; and if there are no lesser seniority employees in the same classification, shall have the right to displace lesser seniority employees in a lower class in the same occupational series. Employees who fail to exhaust their eligibility for demotion to the next lower class in series in their department shall lose their eligibility for Citywide displacement. (Least senior employees displaced under this section shall be subject to demotion, transfer or layoff in accordance with applicable provisions of this Rule.)

* * *

(3)

No. 09-18

Supreme Court, U.S.
FILED
SEP 17 2009
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

GANG B. SONG,

*Petitioner,*

v.

PAMELA TURNER, CHARLOTTE BUSH
and CITY OF DETROIT,

*Respondents.*

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

## REPLY BRIEF

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## TABLE OF CONTENTS

Page

REPLY TO THE RESPONDENTS' REASON I FOR DENYING THE PETITION ..... 1

REPLY TO THE RESPONDENTS' REASON II FOR DENYING THE PETITION ..... 3

REPLY TO THE RESPONDENTS' REASON III FOR DENYING THE PETITION ..... 11

REPLY TO THE RESPONDENTS' REASON IV FOR DENYING THE PETITION ..... 12

APPENDIX

Notice of Reduction in Force Rights to Mr. M. Hasnain ..... App. 1

## TABLE OF AUTHORITIES

RULES

Reduction in Force, Rule 10 ..... *passim*

The attorney for the respondents, Mr. Andrew Jarvis, listed four reasons for denying the petition in his Brief in Opposition. The petitioner's reply to each of the reasons is given below.

## REPLY TO THE RESPONDENTS' REASON I FOR DENYING THE PETITION

The misstatement in the racial claim caused the District Court and the Appeals Court to look for a similarly situated person outside the protected class who was not adversely affected specifically by the execution of the reduction in force. The two courts dismissed the petitioner's racial claim when the two courts could not find such persons. If the misstatement is removed, the two courts will not look for such persons specifically with respect to the execution of the reduction in force.

The discriminatory actions taken against the petitioner before the execution of the reduction in force are already listed in the Form Complaint (pages 5, 6, 7, 9, 10) submitted to the District Court and they are described again in the Appellant Brief (pages 14, 15) submitted to the Appeals Court.

The petitioner was an excellent employee as evidenced by the evaluations he received (See Exhibit 2a and Exhibit 2b of Petition for Rehearing submitted to the Court of Appeals on December 15, 2008) from his two previous supervisors, Mr. Augusto Belen and Ms. Judith Huddleston, who preceded Ms. Pamela

Turner, the petitioner's supervisor who demoted the petitioner.

The petitioner and Ms. Pamela Turner had never had disputes regarding the work done by the petitioner.

Without the racially discriminatory actions taken by the respondents, this lawsuit would never have happened.

The major evidence that the demotion was the result of anything but the reduction in force is that Rule 10 was blatantly and overwhelmingly violated. Because of the misunderstanding of Rule 10 by the District Court and the Appeals Court, the two courts could not see the major evidence.

The hearing officer could not understand Rule 10 correctly. As shown in the Writ of Certiorari (pages 11, 12, 13), the hearing officer's report is the evidence that he could not even know which section of Rule 10 was relevant to look. The respondents know this but they still did not restore the petitioner's class and this seems that the respondents are still retaliating.

Numerous other evidences supporting that the demotion was for retaliation are already listed in the Form Complaint submitted to the District Court and in the Appellant Brief and Petition for Rehearing submitted to the Appeals Court.

Three of them are listed again briefly below.

Why none of the non-union engineers except the petitioner were demoted or laid off? How was it that the petitioner was the only non-union engineer who had to be demoted?

The respondents posted a vacancy announcement for a Water & Wastewater Systems Maintenance Engineer, the same title that the petitioner held before his demotion. They cancelled the posting just before they demoted the petitioner. After they demoted the petitioner, they posted the vacancy again. This means that there was no lack of fund or no lack of work for a Water & Wastewater Systems Maintenance Engineer in the Department. This means that there was no genuine reason for demotion of the petitioner for reduction in force.

After Ms. Pamela Turner demoted and sent the petitioner away, she hired a consulting company, TYJT, to continue to do the work that the petitioner had been doing before his demotion.

## REPLY TO THE RESPONDENTS' REASON II FOR DENYING THE PETITION

The petitioner stated in his Writ of Certiorari (pages 17, 18, 19) that the respondents violated Section 1(a), Section 2, Section 2(b)2(b), Section 4(a) and the spirit of Section 9 of Rule 10.

Mr. Jarvis, attorney for the respondents, denies only one of the violations: violation of Section 2(b)2(b). This denial of his will be proven senseless, contradicting and to have no credibility, as will be described below.

Mr. Jarvis says (9th line from the top of page 5, Brief in Opposition), " . . . , Petitioner misreads Rule 10." This is an outright false statement.

Mr. Jarvis makes a statement in his Brief in Opposition (7th line from the bottom – 2nd line from the bottom, page 5) by replacing a word in the original text of Section 2(b)2(b) with his own words and inserting his own words into the original text of Section 2(b)2(b). This amounts to adulteration and it altered the meaning of the original Section 2(b)2(b). He adulterated the original Section 2(b)2(b) but the petitioner follows the original Section 2(b)2(b) and therefore the petitioner seems to misread Section 2(b)2(b) from Mr. Jarvis' point of view. This will be further discussed later.

Mr. Jarvis says (from the 9th line from the bottom of page 5), "Section 2(b)2(b) applies when an employee previously held permanent status in another class not in series at the same or lower level." This statement of his proves that Section 2(b)2(b) does not apply to the petitioner because the petitioner previously held permanent status in the class of Senior Associate Civil Engineer-Design which is "in the Design series" as opposed to "not in series." In other words, Mr. Jarvis proved by his own statement

that the application of Section 2(b)2(b) to demote the petitioner was a violation of Section 2(b)2(b).

In order to show Mr. Jarvis' argument more transparently, the petitioner first explains briefly below how demotions and layoffs should be done in accordance with the original Section 2(b)2(a) and Section 2(b)2(b).

First of all, an employee cannot be laid off, according to Section 2(b)2 of Rule 10, without first giving the employee an opportunity to be demoted by replacing or "bumping" another employee in the way stipulated by Section 2(b)2(a) or Section 2(b)2(b). An employee who is demoted must bump another employee and take the class of the employee who is bumped. An employee cannot be demoted without bumping another employee because otherwise it is not reduction in force.

Section 2(b)2(a) says, "If the employee is in a class *in an occupational series*, . . . ."

Section 2(b)2(b) says, "If the employee has previously held permanent status in another class *not in series*. . . ."

Since an employee's current (prior to the reduction in force) class either belongs or does not belong to any series group and the employee's formerly-held class (the class prior to the current class) either belonged or did not belong to any series group, there are only four types of possible combinations.

**Type 1:** Say, Employee A's current class belongs to a series group and A's formerly-held class also belonged to a series group (Let us call this series "former series" for short). Then A is subjected to Section 2(b)2(a) only. Subjecting A to Section 2(b)2(a) only makes sense. If A is subjected to Section 2(b)2(a) for his current series and A is also subjected to Section 2(b)2(b) for his former series, then there will be a conflict.

**Type 2:** Say, Employee A's current class does not belong to any series group and A's formerly-held class did not belong to any series group either. Then A is subjected to Section 2(b)2(b) only. If Employee X is currently in the class which Employee A was in previously, this means that X's class does not belong to any series group either. Since both A and X do not belong to any series group, A can bump X without any conflict. An employee who belongs to a series group should not be bumped by another employee who is outside of the series group.

**Type 3:** Say, Employee A's current class belongs to a series group but A's formerly-held class did not belong to any series group. For this type of case, Section 2(b)2(b) says that A can be subjected to either of Section 2(b)2(a) and Section 2(b)2(b). Section 2(b)2(b) also says that A can freely choose either Section 2(b)2(a) or Section 2(b)2(b) for his demotion. Subjecting A to either of Section 2(b)2(a) and Section 2(b)2(b) makes sense. Since A has only one series, the current series, there is no possibility of a conflict that

another series may cause even if he is subjected to either of Section 2(b)2(a) and Section 2(b)2(b).

**Type 4:** Say, Employee A's current class does not belong to a series group but A's formerly-held class belonged to a series group. This happens when a unionized engineer, who has a series, is promoted to a non-union engineer and loses the series. A cannot be subjected to Section 2(b)2(a) simply because A does not have a current series to use and A cannot be subjected to Section 2(b)2(b) because A has a former series.

Not allowing Section 2(b)2(b) to subject A makes sense. If A is subjected to Section 2(b)2(b), A has to bump another employee who has A's former series. The problem with this is that A, who presently does not belong to any series group, bumps an employee, say X, who belongs to a series group. If this happens, some of the engineers in the series group who have higher seniorities than X's seniority lose an employee they can bump when they are subject to layoff. This increases their risk of being laid off and thus violates their right to bump an employee within their series group. The right is clearly given to the employee by Section 2(b)2(a) which says, " . . . , the employee shall have the right. . . ."

The petitioner's current class was Water & Wastewater Systems Maintenance Engineer. Since it is a non-union engineer class on the administrative roster, it does not belong to any series group, that is, it has no hyphenated word at the end of the class title

as shown above. It does not even have a specific engineering discipline such as civil, mechanical, electrical, etc.

Thus, the petitioner's case belongs to Type 4. All non-union engineers are of Type 4 and none of them were demoted or laid off except for the petitioner.

As mentioned in the Appellant Brief (page 24), the respondents did not subject Mr. Parvez Jafri, an acting Head Engineer, to Section 2(a)1. Mr. Jafri would have been demoted back to his permanent, not acting, status class if he had been subjected to Section 2(a)1. However, a unionized engineer in the same situation, Mr. Sushil Batra, was subjected to Section 2(a)1. This and the above indicate that Rule 10 is not applicable to non-union engineers.

Mr. Jarvis says (from the 7th line from the bottom of page 5), "Section 2(b)2(b) is violated when an employee who has previously held permanent status in a different class not in his current series is not allowed to accept a demotion or transfer to that class, provided. . . ."

This is the statement Mr. Jarvis made by adulterating the original Section 2(b)2(b) as mentioned earlier. Mr. Jarvis replaced the word "another" in the original text of Section 2(b)2(b) with his own words "a different" and inserted into "in series" in the original text of Section 2(b)2(b) with his own words "his current."

He alters the meaning of Section 2(b)2(b) even though the original Section 2(b)2(b) makes perfect sense as it is.

**Firstly,** after Mr. Jarvis adulterated Section 2(b)2(b), he decides for himself that, because the series of the petitioner's formerly-held class is different from the petitioner's current series, the petitioner should be demoted by applying Section 2(b)2(b). The original Section 2(b)2(b), however, says nowhere about the sameness or difference between the current series and the former series. Actually the original Section 2(b)2(b) does not allow the petitioner being subjected to Section 2(b)2(b) as explained earlier.

**Secondly,** Mr. Jarvis, in the statement he made by adulterating the original Section 2(b)2(b), says, " . . . not in his current series. . . ." This is nonsense because the petitioner has no current series. Mr. Jarvis should tell the court what his current series is if there is one.

**Thirdly,** Mr. Jarvis says in the statement he made by adulteration that Section 2(b)2(b) is applicable to an employee if the current series and the former series of the employee are different. But this was not done with another employee. The evidence is given in App. 1 of this Reply Brief. It is the Notice of Reduction in Force Rights given to Mr. M. Hasnain. It shows that Mr. Hasnain, Sr. Assoc. Civil Engr.-Design was subjected to "A Demotion or Transfer to the formerly held class of Assoc. Civil Engr.-Design. . . ." In other words, the respondents demoted him by subjecting Mr. M. Hasnain to Section 2(b)2(b) even

though Mr. Hasnain's current series and his former series are the same. This shows that Mr. Jarvis' own altered rule has no credibility.

The respondents made the petitioner bump Mr. M. Hasnain and take his class when they demoted the petitioner. This seems to suggest that the respondents did whatever it took in order to demote the petitioner regardless of Rule 10.

**Finally,** if Mr. Jarvis' altered rule is followed, the Department will ask some employees in a given series group to be bumped by other employees in the given series group while the Department will ask some other employees in the same given group to be bumped by employees outside of the given series group. This arbitrariness invites abuse by the respondents.

Mr. Jarvis also says (from the 2nd line from the bottom of page 5), "Petitioner accepted demotion to his previously held class, which was Senior Associate Civil Engineer." On April 21, 2006, the respondents gave the petitioner two choices: either demotion to his formerly-held class or layoff (Writ of Certiorari, App. 49 and App. 50).

Knowing nothing about Rule 10 at that time, even though the petitioner was convinced that it was retaliation, he chose the demotion. Section 2(b)2 says, "Such employees shall be laid off subject to the following demotion or transfer rights. . . ." Since Section 2(b)2(b) was not applicable to the petitioner, the two choices should not have been presented to the petitioner in the first place.

Mr. Jarvis finally says (from the 1st line from the top of page 6), "Senior Associate Civil Engineer-Design is a formerly held class not in series." The nonsense or contradiction in this Mr. Jarvis' own statement is so obvious. Senior Associate Civil Engineer-Design, as the hyphenated word "Design" indicates, belongs to the Design series group. How can it be not in series?

The above explanation by the petitioner proved in several ways that what Mr. Jarvis says in his Reason II for denying the petition is senseless and contradicting and has no credibility.

As mentioned earlier in the above, violation of Section 2(b)2(b) is only one of the violations. The respondents violated Section 1(a), Section 2, Section 4(a) and the spirit of Section 9 as well.

## REPLY TO THE RESPONDENTS' REASON III FOR DENYING THE PETITION

How can the analysis of incorrect information and the analysis of correct information produce the same result? The pro se submissions were only about violation of Rule 10 by the respondents/defendants and therefore the pro se submissions were mainly related to the retaliation claim. If the District Court had considered the pro se submissions, it would have understood Rule 10 correctly and thus would not have discredited the petitioner/plaintiff so severely.

Also, importantly, when the District Court was doing the analysis, the District Court and the petitioner/plaintiff were not aware that the racial claim contained the misstatement. The misstatement in the racial claim caused the District Court to discredit the petitioner/plaintiff.

If the misstatement in the racial claim and the misunderstanding of Rule 10 are both considered by the District Court this time, it would make a difference.

The petitioner/plaintiff was sending pro se submissions to the District Court because his attorney did not take phone calls, did not return phone messages and did not reply to emails from the petitioner/plaintiff. The petitioner/plaintiff did not tell the District Court about this when he was sending pro se submissions. It was the fault of the petitioner/plaintiff not having told the court why he was sending the pro se submissions. The District Court scolded the petitioner/plaintiff in its Opinion and Order. The petitioner sometimes wonders if the District Court was angry with him when the court was doing the analysis.

## REPLY TO THE RESPONDENTS' REASON IV FOR DENYING THE PETITION

The obstructions occurred after the petitioner/plaintiff filed this lawsuit with the District Court and therefore could not be raised in the District Court.

The obstruction by Ms. Kimberly Hall is described in the Appellant Brief (pages 17, 18).

Respectfully submitted,

GANG SONG, Pro Se

App. 1

**Notice of Reduction in Force Rights**

**TO:** Mohammed Hasnain, Sr. Assoc. Civil Engr-Design Engineering

**FROM:** Evella Thomas
DWSD – Human Resources Office

**DATE:** April 21, 2006

**SUBJECT: Notice of Reduction in Force Rights**

Your position of **Sr. Assoc. Civil Engr.-Design** has been reached for layoff. In accordance with the attached **Human Resources Rule 10**, you have the following rights within the Detroit Water and Sewerage Department to.

---

**SECTION 1 – (To be completed by HR)**

1. **A Demotion in Series to the title of ___ at a salary of $ hr.**

   The status change to your new title will be effective _____.

2. **A Demotion or Transfer to the formerly held class of Assoc. Civil Engr.-Design at a salary of $59,300.**

   The status change to your new title will be effective **May 8, 2006**.

---

**SECTION 2 – (To be completed by Employee)**

**In accordance with Human Resources Rule 10 and/or the applicable contract provision, I understand that my failure to select one of the above-mentioned options shall result in layoff and may effect my citywide displacement and recall rights. I understand that by waiving my right, I may be deemed inelligible for unemployment benefits by the Michigan Unemployment Insurance Agency.**

**☒ I select # 2**

**OR**

**☐ I select layoff _____**

**Employee signature** Mohammed Hasnain

**Date** 04/25/06

**ATTACHMENT – RULE 10**